TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 202.

THE BALTIMORE & POTOMAC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE FIFTH BAPTIST CHURCH.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MARCH 29, 1880.

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1 *Declaration.—Filed March 22nd, 1877.*

In the supreme court of the District of Columbia, the day of , A. D. 1877.

THE FIFTH BAPTIST CHURCH OF WASHINGTON City, D. C., by its trustees,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY.
} At law. No. 17470.

(1.) The plaintiff, a body corporate in the District of Columbia under and by virtue of the general act of incorporation of the Congress of the United States, approved the 5th day of May, A. D. 1870, sues the defendant, a corporation duly chartered by the laws of the State of Maryland, having an office and doing business in the city of Washington, in said District, for that the plaintiff heretofore, to wit, at and before the commencement of the grievances hereinafter mentioned, was, and hitherto hath been, and still is lawfully possessed of a lot of ground situate and be-
2 ing in said city of Washington, to wit, on D street south, between Four-and-a-half and Sixth streets west, in said city, upon which said lot the plaintiff, at and before the commencement of the said grievances hereinafter complained of, caused to be erected a building for the purpose of being used as a meeting-house, a place of public religious worship; that the defendant thereafter, to wit, on the first day of April, A. D. 1874, erected and built, or otherwise became and was possessed of and maintained and used, a certain engine-house or houses, yard or yards, and also a certain machine shop or shops, immediately contiguous to and adjoining the said lot and meeting-house of the plaintiff, wherein the defendant was, and from the day and year aforesaid hath been, and still is, wrongfully and injuriously accustomed to keep, store, and house, and also to fire, hammer, and repair, and to move and propel back and forth by steam, improperly, unlawfully, and to the great damage of the plaintiff, upon Sabbath days, when not engaged in works of necessity or charity, and upon divers others days, a large number, to wit, twenty locomotive steam
3 engines; and the said defendants, on the said first day of April, A. D. 1874, and on divers other days between that time and the commencement of this suit, wrongfully, improperly, and injuriously, itself and by its agents, on Sabbath days, unlawfully as aforesaid, and on divers other days when the religious society or congregation accustomed to use the said meeting-house were lawfully assembled therein and engaged in public religious worship, did, by wrongfully and unjustly causing to be made and continued in the said engines divers large and injurious fires, against the will of the plaintiff and of the said religious society or congregation, cause to issue and proceed therefrom large quantities of offensive and unwholesome smoke, steam, vapors, and other gaseous effluvia arising from the said fires and engines, entering the windows of the said meeting-house and spreading and diffusing themselves in, upon, over, and throughout the same, to the great and intolerable discomfort and inconvenience of the said society or congregation, and to the damage of
4 the said meeting-house and injury of the plaintiff; and by ringing

the bells attached to the said locomotive engines, and by the puffing and whistling of said engines, and the blowing off of steam therefrom while standing in the said engine-house or houses, yard or *yar* yards, immediately contiguous to and adjoining the premises of the plaintiff as aforesaid, and while being moved and propelled as aforesaid by the defendant or its agents back and forth between the said engine-house or yard and the main track of the defendant's railroad on Virginia avenue, fronting the said D street south in said city, and by the rumbling, jarring noises of the said locomotives of the defendant when being moved and propelled as aforesaid; and farther, by the wrongfully, injuriously, and continuously making and causing to be made in the said machine shop or shops, and in and about the said engines, unlawfully on Sabbath days as aforesaid, and on divers other days, divers loud, heavy, jarring, hammering, battering, and agitating sounds and noises, and by the unlawful
5 and improper use of its locomotives and machine shops on Sabbath days as aforesaid, and upon other days, did and hath and still doth disturb, annoy, and molest the said religious society or congregation while engaged in worship as aforesaid, by means whereof the value of the said lot and premises of the plaintiff was and is greatly depreciated, and the said meeting-house was and is rendered unsuitable and comparatively valueless as a house of worship, and incapable of being used in so advantageous and beneficial a manner as it otherwise might and would have been used, to the great damage of the plaintiff in the sum of $20,000. And therefore it brings its suit.

(2.) The plaintiff as aforesaid sues the said defendant for that the plaintiff at and before the said first day of April, A. D. 1874, and before the commencement of the grievances hereinafter set forth, was, and hitherto hath been, and still is, lawfully possessed as aforesaid of a lot and a meeting-house or place of public worship thereon, erected as aforesaid, situate on said D street south, in the city of Washington, between
6 Four-and-a-half and Sixth streets west, in said city, and that the said defendant, having lawful authority to construct a railroad running northwestwardly along the line of Virginia avenue, in said city, between said Four-and-a-half and Sixth streets west, and not elsewhere between said streets, did, nevertheless, wrongfully and without right construct, or cause to be constructed, a track extending from said Virginia avenue, between said Four-and-a-half and Sixth streets west, across said D street south, and within a very short distance, to wit, the distance of fifty feet, from the said lot and premises of the plaintiff to and into the certain engine house or houses, yard or yards, and machine shop or shops so as aforesaid wrongfully and injuriously possessed, occupied, and used by the defendant, and from the said first day of April, A. D. 1874, hitherto hath been and still is accustomed unlawfully on Sabbath days, when not engaged in works of necessity or charity as aforesaid, and on divers other days since said period when the religious society or congregation accustomed to use the said meeting-house as aforesaid were lawfully
7 assembled therein and engaged in public religious worship, to cause divers, to wit, twenty, locomotive engines to pass and repass, propelled by steam as aforesaid, over the said track so as aforesaid unlawfully constructed near to as aforesaid the said meeting-house of the plaintiff, and to hinder, delay, and obstruct and to render difficult and dangerous access

to said meeting-house by the passage and repassage as aforesaid of said locomotives, and by the stoppage of the said locomotives, with the tender and cars attached, at, upon, over, and across the pavement or side-walk of the said D street south, over which the members of said society or congregation are compelled to pass in order to reach said building or meeting-house, for long and unreasonable periods, at night as well as at other times, while said tenders and cars are being loaded and unloaded with coals and other substances; and to produce, by means of the said locomotives and the passage and repassage, stoppages and startings of the same, divers loud, heavy, jarring, hissing, and agitating sounds and noises, with dense volumes of offensive, unwholesome, and suffocating
8 smoke entering the doors and windows of the said meeting-house, to the great inconvenience, hindrance, discomfort, interruption, and annoyance of the said society or congregation, and to the great depreciation in value of the said premises, rendering the said meeting-house unsuitable and unfit for the purpose for which the same was erected and was and is used, and to the great damage of the plaintiff in the sum of $20,000. And therefore it brings this suit.

3. The plaintiff sues the defendant for that the plaintiff, on and before the day and year above mentioned, and before the commencement of the grievances hereinafter complained of, was, and thence hitherto hath been, and still is, lawfully possessed of the said lot, situate as aforesaid, and the said meeting-house thereon erected for the purposes above set forth; and the defendant, on the said day and year, and thence hitherto hath, wrongfully and injuriously kept, maintained, and used, and still doth keep, maintain, and use, the said engine-house or houses contiguous to and adjoining as aforesaid
9 the said meeting-house of the defendant, and situate but a short distance, to wit, the distance of five feet, from the west wall thereof, and did, on the day and year aforesaid, and thence hitherto, and still doth cause to issue and proceed from divers, to wit, twenty, smoke stacks or chimneys attached to, connected with, or forming part of the said engine-house, or houses, which said smoke stacks, or chimneys, the defendant hath wrongfully and injuriously constructed or raised to a height parallel with, and situate not more than a short distance, to wit, the distance of fifty feet, from the windows of the said church building or meeting-house of the plaintiff, wrongfully, as aforesaid, upon Sabbath days, and upon divers other days, as aforesaid, when the religious society or congregation accustomed to use the said church building were lawfully assembled therein and engaged in public religious worship, dense volumes of black, injurious, offensive, and suffocating smoke, cinders, ashes, steam, and vapors, entering the said windows of the plaintiff's said church building, and spreading and diffusing
10 themselves over, in, and through the said building, to the great disturbance, interruption, discomfiture, and annoyance of the said society, or congregation, and the said property of the plaintiff has been thereby greatly depreciated in value, and the plaintiff has been thereby prevented from having so beneficial a use and occupation thereof as it otherwise might and would have had, to the great damage of the plaintiff in the sum of $20,000. And therefore it brings its suit.

LAMBERT & DARLINGTON,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court occurring 20 days after service hereof, otherwise judgment.

LAMBERT & DARLINGTON,
Attorneys for Plaintiff.

Summons.—Issued March 22nd, 1877.

11 In the supreme court of the District of Columbia.

THE FIFTH BAPTIST CHURCH, PLAINTIFF,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY, defendant.
} At law. No. 17470.

The President of the United States to the defendant, greeting:

You are hereby commanded to appear in this court on the first day of its special term occurring 20 days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness: D. K. Cartter, chief justice.

[SEAL OF COURT.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Ass't Clerk.*

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

On back:

Served copies of the declaration, notice to plead, affidavit, and this
12 summons, on the defendant O. K. Sharp, for R. R., the 22nd day of March, 1877.

F. DOUGLAS,
Marshal.

Pleas.—Filed May 1st, 1877.

In the supreme court of the District of Columbia.

FIFTH BAPTIST CHURCH
vs.
BALTIMORE & POTOMAC RAILROAD COMPANY.
} At law. No. 17470.

1. Defendant says it is not guilty as alleged.

2. And for a further plea defendant says that the plaintiff's alleged cause of action did not accrue within three years before this suit.

3. And for a further plea defendant says that the plaintiff's alleged cause of action did not accrue within one year before this suit.

STANTON & WORTHINGTON,
Att'ys for Def't

13 *Replication.—Filed May 7th*, 1877.

In the supreme court of the District of Columbia, the 2nd day of May, 1877.

THE FIFTH BAPTIST CHURCH
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY. } At law. No. 17470.

1. The plaintiff joins issue upon the defendant's first plea.
2. The plaintiff joins issue upon the defendant's second plea.
3. The plaintiff joins issue upon the defendant's third plea.

LAMBERT & DARLINGTON,
Attorneys for Plaintiff.

Note of issue.—Filed May 7th, 1877.

In the supreme court of the District of Columbia the 7th day of May, A. D. 1877.

14 THE FIFTH BAPTIST CHURCH
vs.
THE BALTIMORD & POTOMAC RAILROAL COMPANY. } At law. No. 17470.

Lambert & Darlington, attorneys for plaintiff.
Stanton & Worthington, " " defendant.

Last pleading, replication, filed May 7th, 1877.

LAMBERT & DARLINGTON,
Attorneys for Plaintiff.

Proceedings before the supreme court of the District of *of* Columbia, holding a special term and circuit court in and for said District, commencing on the second Monday, 12th day of May, A. D. 1879.

MONDAY, *May 12th*, 1879.

By order of Cox, justice, one of the justices of said court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

15 TUESDAY, *June 24th*, 1879.

Session resumed pursuant to adjournment. Wylie, justice, presiding.

THE FIFTH BAPTIST CHURCH, PLAINTIFF,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY, defendant. } At law. No. 17470. Cal. 242.

Now comes here as well the plaintiff by its attorneys, Messrs. Darlington & Merrick, as the defendant, by its attorney, Mr. Totten, and a jury of

good and lawful men of this District, to wit, Robert A. Ballock, Horace B. Howes, William Muirhead, David Atkins, Charles A. Acker, Lawrence H. Hopkins, Charles F. Wilkins, Granville F. Hyde, David S. Reed, James N. Deane, Cyrus S. King, and John Prinkert, who, being duly sworn to try the issue above joined, are respited until the meeting of the court to-morrow.

WEDNESDAY, *June 25th*, 1879.

Session resumed pursuant to adjournment, Wylie, justice, presiding.

16 THE FIFTH BAPTIST CHURCH, PL'FF, *vs.* THE BALTIMORE & POTOMAC RAILROAD COMPANY, def't. } At law. No. 17470. Cal. 242.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

THURSDAY, *June 26th*, 1879.

Session resumed pursuant to adjournment, Wylie, justice, presiding.

THE FIFTH BAPTIST CHURCH, PL'FF, *vs.* THE BALTIMORE & POTOMAC RAILROAD COMPANY, def't. } At law. No. 17470. Cal. 242.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say they find the issue aforesaid in favor of the plaintiff, and assess its damages by reason of the premises at four thousand
17 and five hundred dollars, besides costs. Therefore it is considered that the plaintiff recover against said defendant four thousand and five hundred dollars, for its damages by reason of the premises and $ for its costs of suit, and have execution thereof.

THURSDAY, *July 3rd*, 1879.

Session resumed pursuant to adjournment, Wylie, justice, presiding.

THE FIFTH BAPTIST CHURCH, PL'FF, *vs.* THE BALTIMORE & POTOMAC R. R. CO., DEF'T. } At law. No. 17470.

Now again comes here the defendant, by its said attorney, and tenders to the court here its bills of exceptions to the rulings of the court on the trial of this case, and prays that they may be duly signed, sealed, and made a part of the record, now for then, which is done accordingly.

Motion for new trial on exceptions.—Filed July 3rd, 1879.

In the supreme court of the District of Columbia.

THE FIFTH BAPTIST CHURCH
vs.
BALT. & POTOMAC R. R. CO. } At law. No. 17470.

18 And now comes the said defendant and moves the court for a new trial on exceptions.

ENOCH TOTTEN,
Att'y for Def't.

Bill of exceptions.—Filed July 3rd, 1879.

In the supreme court of the District of Columbia.

FIFTH BAPTIST CHURCH, PL'FF,
vs.
THE BALTIMORE & POTOMAC R. R. CO., DEF'T. } At law. No. 17470.

This cause coming on in its regular order for trial before the circuit court, Andrew Wylie, justice, presiding, the plaintiff, to maintain the issues joined on its part, introduced evidence tending to prove as follows:

That the plaintiff owned and used its premises, described in the declaration as a place of public worship, since the year 1857; that its present church building was began in the year 1867, and since the year 1868 or 1869 has been continuously occupied and used by the plaintiff as its house of worship.

That in the year 1872 the defendant erected upon the parcel of ground immediately adjoining plaintiff's said premises on the west, and during the period embraced within its said suit, to wit, from
19 April 1st, 1874, to the time of suit brought, viz, the 22ond day of March, 1877, maintained an engine-house and machine-shop, where a large number of locomotives, steam-engines, were housed, fired, propelled back and forth, coaled, watered, repaired, and otherwise used; that when the ground was first broken for the erection of said works, the plaintiff advised the president of the defendant company that said works, if erected in that locality, would be a nuisance, ruinous to the plaintiff, and protested against their erection there, but that said defendant did nevertheless proceed to erect its said works in said location, and placed the same upon the building-line of its own premises, and within five and a half feet from plaintiff's church building, and constructed upon its said engine-houses sixteen smoke stacks, lower in height than the windows of the main audience room of plaintiff's said building, and distant, the nearest of them, less than sixty feet from said windows, and the others in a semi-circle curve at gradually increasing distances.

The plaintiff further introduced evidence tending to prove that
20 during the period covered by its suit, the plaintiff was accustomed to hold services in its said building three times on every Sabbath day, to wit, Sunday-school exercises commencing at 9 o'clock a. m., preach-

ing at 11 o'clock a. m., and again at half past seven or eight o'clock p. m. That services at night were regularly held therein on Wednesday evening of every week, and on the first Tuesday and Friday evenings of every month, and that at intervals protracted religious meetings were held every night in the week except Saturday night; that during the entire period covered by this suit, said services were ordinarily and habitually interrupted and disturbed by the hammering noises made in the defendant's said workshops, by the rumbling of engines passing in and out of the same, and by the blowing off of steam from said engines, &c.; that these noises were of such a character at times to prevent members of the congregation sitting in the parts of said church most distant from said shops from hearing anything that was said; that the operation of blowing off steam from said engines, occupying from five to fifteen minutes in duration,
21 frequently compelled the pastor to suspend his remarks while the noise created thereby was at its height, and that said operation was of ordinary and habitual occurrence, on Sundays as well as at other times, at night as well as during the day.

That in the summer time, when the windows of said church were opened for the purpose of admitting air, during the period embraced in said suit, smoke, cinders, and dust were thrown from the smoke stacks of said engine-houses into said windows, settling upon the pews and furniture in considerable quantities, and soiling the clothing of the occupants of said pews; that said smoke was accompanied by an offensive and disagreeable odor, greatly annoying said congregation; and that said church would have been greatly relieved either by locating said works on a different part of defendant's said premises, or by raising said smoke stacks as high as the roof of said church building, and that the latter improvement could have been effected at slight cost, and would have increased the draft of said smoke stacks.

The plaintiff further introduced evidence tending to show that
22 Virginia avenue and D street south form a junction or gradually merge into each other in front of defendant's said premises; that in order to reach its works on its said premises, the defendant constructed, and, during the period embraced in this suit, maintained and used a lateral track or siding leading to said works from Virginia avenue, along which avenue alone said defendant was authorized by the act of Congress granting its right of way in the District of Columbia, to construct its tracks; and that said lateral track or siding leaves said Virginia avenue and enters upon and crosses a part of said D street, though not across its entire width, and passes over the sidewalk of said D street into defendant's said works, at a distance of about one hundred feet from the door of plaintiff's said church building; that defendant's locomotives daily stand at the entrance of defendant's said premises, with their cow-catchers protruding several feet beyond the enclosure, and are sometimes permitted to stand clear across the sidewalk of said D street, at said distance from the church door, along which sidewalk two-thirds of plaintiff's congregation
23 were and are compelled to pass in going to and from said church; and that access to said church building was thereby obstructed and rendered dangerous; that on several occasions members of said church and congregation narrowly escaped being run over by the sudden starting of said locomotives, without note or warning; that plaintiff's congre-

gation has been thereby diminished; that attendance upon the Sunday school of said church had been decreased thereby during said period by about one-fourth; that said Sunday school was a source of revenue to the plaintiff, having contributed about $1,000.00 toward the construction and improvement of said church building between the years 1873 and 1877; and that the revenue derived from said Sunday school was proportioned to the attendance thereon.

The plaintiff also introduced evidence tending to prove that during the period embraced in this suit the value of unimproved property in the locality of its church building was from 25 to 35 cents per square foot; that said building cost about $23,000; that its property was worth about $20,000; that the gross annual income from real estate within said
24 period averaged from seven to ten per cent. on the value of the property; that by reason of the proximity of the defendant's said works the plaintiff's said property for church purposes was almost ruined; that its rental value, ordinarily estimated, would be from $1,200 to $1,600 per annum; that with defendant's works adjoining it could hardly have been rented at all; and that defendant's said works have tended to depreciate the value of real estate in their vicinity as much as fifty per cent.

The plaintiff also introduced in evidence a map of the locality in question, showing the location of its said church building, the defendant's works, the junction of D street and Virginia avenue, &c., etc., taken from an actual survey; a copy of which map is hereto annexed, marked Exhibit W. F.

And thereupon the plaintiff rested.

(Here follows diagram, marked page 24.)

25 Thereupon the defendant, to maintain and prove the issue joined on its part, gave evidence to the jury tending to show that the defendant maintained and operated a line of railroad along Virginia avenue, from the eastern termination of K street southeast to Sixth street northwest, and from the junction of Virginia avenue and Sixth streets as aforesaid, to the Baltimore and Potomac depot, at the corner of B and said Sixth street, and also from there, along Maryland avenue, to the western end of the Long Bridge, across the Potomac River; that the defendant run about sixty (60) trains every week day in and out of the city of Washington, and that on Sundays about ten (10) trains were run; that the locomotive engines used by the said defendant were the best known to the business, or invented by science; and that the persons employed by the said company in the city of Washington numbered about two hundred (200), and that they were all skilful men in their particular branches of
26 business, well behaved, careful, and diligent; and that the employees in the engine-house and repair shop in question were well-behaved and careful men; and that in the operation and management of the said repair shop and engine-house, no more noise is made than is necessary, and took extraordinary care on Sabbath days to preserve quiet in the neighborhood of the church; that the main shop of the Baltimore and Potomac Railroad Company is and was located in the city of Baltimore; that the repair shop and engine-house which is the subject-matter of complaint in this case was constructed by the Baltimore and Potomac Railroad

Company in 1872, and has been in operation ever since; that the same is located at the junction of Virginia avenue and Sixth street, and between Virginia avenue, D, and C streets, southwest; that the general repairs are all made in the main shop in the city of Baltimore; and that the repair shop and engine-house aforesaid was intended to be, and always has been, used only for the purpose of making casual and temporary repairs in order to keep the machinery, engines, &c., in operation; and that the said engine-house contains sixteen (16) stalls, or places for the locomotive en-
27 gines to stand. Each stall is provided with a track to enable the engines to be conveniently run in and out; and over each stall is a chimney or smoke stack, the cap of each smoke stack being eight (8) feet and ten (10) inches above the roof of the said engine-house, and the top of the stack being 18 inches below said cap.

Counsel for the defendant gave in testimony to the jury the building regulations of force in the city of Washington at the time of the construction of the said engine-house and repair shop, which require that all chimneys on buildings of that character should be at least *from* 4 feet higher than the roof of the building. Evidence was also introduced tending to show that the construction of the said engine-house is according to the best models known to the business, and all its appointments and appliances are well adapted to the work intended to be done therein, and that its capacity is sufficient for the performance of the work aforesaid, and not greater. That the said engine-house and repair shop is provided with a stationary engine, three lathes, one drilling-press, a planing
28 machine, and a blacksmith's forge; the stationary engine is located on the corner of C street and an alley-way, and the blacksmith's forge is in the northwest corner of the said engine-house, at the nearest point to the corner of said Sixth and C streets, and that the drilling-press is located also in that corner; that three of the said stalls are used for the purpose of keeping therein "dead" engines, or engines not generally in use, which generally have no fire in them; another of the said stalls is used for a car shop; and another to keep wheels, making in all five stalls that are not generally used for the active business of the engine-house, which five stalls are located nearest to the church of the plaintiff. That the distance between the nearest chimney or smoke stack on the said engine-house is fifty-nine (59) feet and six inches (6) *inches*, and that the height to the cap of the said chimney from the ground is thirty (30) feet and two and one-half (2½) inches, and that the height to the top of the nearest window of the church from the ground is thirty-two (32) feet
29 and four (4) inches. That the distance between the third nearest smoke stack is sixty-eight (68) feet from the nearest window of the church, and that the sixth smoke stack is from about seventy-five to eighty feet from the nearest window of the said church. That the distance between the nearest smoke stack of the said engine-house across C street to the dwellings there is about seventy (70) feet.

That the working hours observed by the said engine-house and shop are in the winter from seven o'clock in the morning until five o'clock in the evening, and from five o'clock in the morning until six o'clock in the evening in the summer, one hour being allowed for dinner; that during the period covered by this suit, to wit, between the 1st day of April, 1874, and the 22ond day of March, 1877, fires were rarely built in any of the

five stalls nearest to the said church; and that the foreman of the said shop and the managing officer of the business of the railroad company in the city of Washington gave orders that all possible care should be observed by the workmen in the said shop to prevent annoyances
30 of any kind on Sundays to the people attending divine worship in the plaintiff's church; that on Sundays no more work was ever done than was necessary, averaging about two Sundays per month, and that no sounding of bells or steam-whistles ever takes place in the city of Washington, or has ever taken place in the city of Washington since 1872, except in cases where an accident was liable to occur; that when engines were brought into the engine-house, ordinarily the steam was not blown off; that the same is permitted to die out of its own accord, and that no blowing off of steam is necessary in order to repair a locomotive engine unless such repairs are needed upon the boiler thereof.

That the water tank from which the locomotive engines were supplied with water stood within a few feet of the entrance of the yard, and that when an engine moving out stopped to take water at the tank the nose of the cow-catcher protruded beyond the fence the distance of two (2) feet and not more, and that during the period covered by this suit no engines had been permitted to stand across the sidewalk or to obstruct the same, so far as defendant's witnesses knew.

That the distance from the center of the church door to the
31 entrance gate of the said yard or engine-house is one hundred and ten (110) feet, and that a line drawn from the said sixth chimney or smoke stack on top of the said engine-house directly eastward would fall fifty (50) or sixty (60) feet in the rear of the church building. And the defendant thereupon introduced in evidence a map of the said engine-house and repair shop, showing the location thereof, the streets surrounding the same, the buildings thereon, the general distances, etc., etc.; which map is marked Exhibit A, and attached to this bill of exceptions and made a part thereof.

(Here follows diagram, marked page 31.)

That generally the dwelling-houses in the locality of the said shop are small tenement houses; that the buildings on the north side of the square in question (sq. 493) are small two-story frame tenements, occupied principally by colored people, and that one colored family resides on the south side of said square, adjoining said church, and that the remainder of the south side and the whole of the east side of said square is occupied for store property. That on the corner of Sixth street and C, opposite to the yard of the said defendant is the Sixth Presbyterian Church, and on the corner of Virginia avenue and Sixth streets opposite to the said
32 yard the Jefferson school building is located, and that further to the east on Virginia avenue, on the opposite side, is located a steam fire-engine with the company belonging to the same; and that the value of unimproved real estate in that vicinity was during the period covered by this suit, worth from twenty (20) to fifty (50) cents a foot, and that the value of property in that locality was not depreciated or diminished in any manner by the location of the said shops at that point, and by the presence of the said railroad, and that the rental value of property was not diminished from the fact of the location and maintainance of the said engine-house and

shops at that point, and that the usual income from real estate during the period covered by the suit was from seven (7) to nine (9) per cent. gross and from four (4) to five (5) per cent. net, on the value of the property.

That the said church is located immediately east of the property of the said company used for its said engine-house and repair shops, and is separated therefrom by an alley five and one-half (5½) feet in width, said alley being part of the church property; and that fronting on D street
33 and Virginia avenue, on the west side of the said church there are two dwelling-houses and one shed occupied and used by the railroad company for a telegraph office, carpenter shop, etc., and that in the rear of the said telegraph office, etc., is a space of considerable width covered over and used by the company for the purpose of stowing old materials. That the distance between the rear of the said building occupied for telegraph purposes, &c., to the south wall of the said engine-house is from thirty (30) to forty-five (45) feet; that the distance between the south wall of the said engine-house and the north wall of the said church is about fifty (50) feet; that in front of the said church and in front of the said engine-house is a park sixteen (16) feet and six (6) inches wide, and that outside of the said park, and between the said park and the curb line is a foot-walk ten and one-half (10½) feet wide; that the front of the said church is fifty (50) feet wide, and that the said church is eighty-one (81) feet and seven (7) inches deep.

The defendant also introduced and read in evidence an act of the general assembly of the State of Maryland, entitled "An act to incorporate the Baltimore and Potomac Railroad Company," approved May
34 6th, 1853, the 12th section thereof being in the words and figures following, to wit:

"SEC. 12. And be it enacted, That the president and directors of the said company should be, and they are hereby, invested with all the rights and powers necessary to the construction, working, use, and repairs of a railroad from some suitable point in or near the city of Baltimore, and thence within one mile of the town of Upper Marlboro', in Prince George's County, and as near to said town, within the limits of said distance as may be practicable, and by or near the town of Port Tobacco, in Charles County, to a point on the Potomac River to be selected by the president and directors of said company hereby incorporated, not higher up than Liverpool Point, and not lower down than the mouth of St. Mary's River, with such branches at any point of said railroad not exceeding twenty miles in length as the said president and directors may determine. The said road when completed not to be more than sixty-six feet wide, except at or near its depots or stations, where the width may be made greater, with as
35 many tracks as the president and directors may deem necessary; and the said president and directors may cause to be made, or may contract with others for making, said road or any part of it; and they or their agents, or those with whom they may contract, or their agents, may enter upon and use and excavate any lands which may be wanted for the site of said road or the erection of warehouses or other works necessary for the said road or for its construction and repair, and that they may build bridges, fix scales and weights, lay rails, may take and use earth, gravel, stone, timber, or other material which may be needed for the construction and repair of the said road or any of its works, and may make and con-

struct all works whatever which may be necessary and expedient in order to the proper completion and maintenance of the said road; and they may make or cause to be made lateral railways in any direction whatever from the said railroad, and for the construction, repair, and maintenance thereof shall have all the rights and powers hereby given in order to the construction and repair of said principal railroad, and may also own and employ steamboats or other vessels to connect the said railroad or railroads
36 with other points by water communication; provided nothing herein contained shall be construed to authorize the said company to take private property for their use without compensation agreed upon by the company and the owners thereof, or awarded by a jury, as hereinafter provided, being first paid or tendered to the party entitled to receive such compensation."

The defendant also read in evidence the act of Congress, approved February 5th, 1867 (14 Stat., 387), and the act of Congress, approved March 18th, 1869 (16 Stat., 1), amendatory thereof.

(And it was and is agreed by counsel that the said act of the general assembly of Maryland and the acts of Congress referred to, and all acts amendatory thereof may be read on the hearing of this case from the printed books of statutes.)

And thereupon the defendant rested.

The testimony of both parties being closed, the defendant by its counsel thereupon moved the court to instruct the jury to bring in a verdict for the defendant, on the ground that no sufficient evidence had been adduced to the jury upon which to base a verdict, which motion, after having been argued by counsel was, by the court overruled.

37 *Exceptions.*

1. The testimony on both sides being closed, the plaintiff's counsel asked the court to instruct the jury in the words and figures following, to wit: If the jury find from the evidence that the engine-house of the defendant is used for receiving its engines when they come into the city after a trip; that after coming into said engine-house such engines more or less frequently blow off their steam, and that such blowing off of steam makes a loud and disagreeable noise, and that such engines are put in the stalls in said house, and emit the smoke from their fires through the chimneys of said house, and that the said engine-house is used for the purpose of a shop in which to make certain class of repairs upon the engines and cars of the defendant, and that a loud noise of hammering is created in making such repairs, and that said engine-house is also used to receive coal for coaling the engines of defendant before going out, and that they are all coaled therein, and also get up their fire and steam therein, and further find that said house is located so near the church of the plaintiff
38 that the noises from said engine-house can be distinctly heard inside of the said church, and also that the chimneys of said engine-house are so constructed that the tops thereof are not as high as the tops of the windows of said church, and shall further find that the smoke from said chimneys is thrown through said windows into said church in such quantities and so generally as to be a common annoyance and inconvenience to the congregation worshiping therein, and that said noises in said

yard, of blowing off steam, are of daily and nightly occurrence, and are so distinctly heard in said church on Sundays, as well as the days of the week, as to annoy, harrass, and inconvenience the congregation when engaged in divine worship therein, and that they disturb and greatly inconvenience the congregation in the enjoyment of said building as a church, then the plaintiff is entitled to recover, provided the jury find that said church was located upon the spot where it now is before the defendant established its engine-house in its present position, and provided the jury further find that the annoyance and inconvenience to said congregation from the smoke and noises above mentioned occurred within three years before the date
39 at which this suit was brought, and provided further that said noises and smoke depreciated the value of the property of the plaintiff within the period from April first, 1874, to March 22ond, 1877.

Which prayer was then and there by the court granted and read to the jury, and the justice holding the said court, thereupon, in addition to the said prayer, charged and instructed the jury as follows, to wit:

If you find all these facts, then this shop is a nuisance, and a special annoyancer to the congregation that worship in this church. Every man has a right to the comfortable enjoyment of his own house, in which enjoyment a neighbor cannot molest him; and no grant conferred by proper authority upon any corporation to construct a railroad along the public streets, or to build shops, can be construed as authorizing that company to construct a nuisance. If the work is of such a necessary kind that the company must have it, if the shop is of that character, and yet is a nuisance in the neighborhood, they must find some other place to put it. No legislature has a right to establish a private nuisance.

40 This case is very different from the case of Nottingham. In that case Congress had authorized this same company to construct its railroad along the line of Virginia avenue through its centre, and to conform to the grade of the city. The avenue belonged to the government. The soil in the avenue and the title were in the government. It had a right to use the street itself for the public benefit in any way that it might think proper. It was its own property. Every man who buys a lot adjoining the street, buys it subject to the power of the government to improve that street or change the grade from time to time, and to direct what manner of vehicles shall run over it. If the government, in the exercise of that power, or if a company in the exercise of the same power, under a grant from the government, construct its road adjoining properties, the owners of property will have to conform to the grade of street, and if damage be done, it is a damage which the company is not obliged to pay, because the company is only exercising its own right upon its own ground. Every man who buys a lot under such circumstances, buys it, knowing that the government had that power, and takes the risk.

41 But if the government, in addition, had undertaken to confer upon this company the authority to take any man's private property without paying him for it, that would not be a valid grant, because it is contrary to the first principles of the Constitution and of common right.

Had the government undertaken to authorize the company to go into a neighborhood and establish a nuisance of any kind on its own property in the vicinity of private property, we could not sustain such an attempt as that in this court.

These grants have to be construed in a reasonable way. If the power to erect a workshop be granted to a company, and the company be authorized to select a place for its location, the presumption is (and the grant is to be so interpreted) that the company will make its selection for the place of its workshop where the workshop will not create a nuisance.

To all of which instructions the defendant, by its counsel, then and there excepted, and the exceptions were noted on the minutes of the court.

2. The plaintiff, by its counsel, thereupon further asked the court
42 to grant the following prayer, to wit:

The actual amount of pecuniary loss to the plaintiff is not necessarily the rule of damages in actions like the present. In estimating the amount of compensation to the plaintiff for the injury, if any, found to have been sustained by it, the jury may determine the extent of the injury and the equivalent damages, in view of all the circumstances of said injury to said plaintiff, of depreciation in the value of its property during the period embraced in this suit, and of interferance with the uses to which said property was devoted by said plaintiff during said period, and of all other particulars, if any, wherein the plaintiff is shown to have been injured during said period, and for which, under the instructions of the court, said plaintiff is entitled to recover.

Which prayer was granted, and was read by the court to the jury, and thereupon the court further told and instructed the jury as follows, to wit:

That prayer I think is substantially right. The suit is brought by a congregation duly incorporated, and they have brought an action to recover damages for their inconvenience and discomfort in conse-
43 quence of the acts of the defendant. It is the personal discomfort more than anything else which is to be considered in regard to the assessment of damages. Now, I can very easily imagine, and it may often happen, that the construction of an improvement such as this might increase the value of property in the vicinity, and I am not sure at all that the erection of this workshop in that neighborhood may not really have increased the intrinsic value of the property belonging to this congregation. The evidence in the case does not, as it seems to me, show that this property has been depreciated by the construction of that workshop. We can imagine, and it is not a far-fetched imagination either, that the effect of such a workshop in that neighborhood might be to collect a population around it, and thus increase the population in that neighborhood and really enhance the value of property; and yet the congregation would be entitled to recover damages (although their property might have increased in value) because of the inconvenience and discomfort they have suffered from the use of the shop. The congregation has the same right to the
44 comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort which is the primary consideration in allowing damages.

To all of which instructions the defendant, by its counsel, then and there excepted, which exception was duly noted upon the minutes of the court at that time.

3. Thereupon the counsel for the plaintiff further asked the court to instruct the jury as follows, to wit:

If the jury find from the evidence that among other purposes the plaintiff's church was used by the said plaintiff as a school-house for the instruction of children on Sabbath day, and that a revenue was derived from such school, depending for the amount thereof upon the number of children attending said school, and shall also find that the defendant was in the habit of allowing its engines, with steam on and ready to move out over D street, to lie adjacent to the sidewalk of said D street, adjacent to its work-shop and engine-house, and that in consequence of said engine being so allowed to occupy such position, the number of pupils attending said
45 school was diminished, and that from the said cause the number of the pupils of the said school was lessened within the period from March 22nd, 1874, and March 22nd, 1877, then the jury will consider the extent of such special damage to the plaintiff, should they find such special damage an element in making up their verdict in this case.

Which prayer was also granted, and by the court then and there read to the jury; and thereupon the court further instructed the jury in this connection, as follows:

I grant that prayer because there is some evidence that this congregation used that church partly for a Sunday-school where children are instructed, and that those children were in the habit of contributing, and have contributed, sums of money to the support of the church. A party is entitled to be compensated, not only for actual damages sustained from the acts of the defendant, but in a case like this is entitled to his damages for a continuous and threatened danger. A man is entitled to recover damages from the owner of an adjoining property ready to tumble down upon himself or his family. That is a threatened danger, and al-
46 though the danger may not have been actually sustained, yet people are not to be kept in alarm constantly by a threat of danger. It may fall upon him at any time, and a court of chancery would direct it to be removed, and on an indictment for a nuisance of that kind it would be removed.

But in private actions like this, it may be taken into consideration by the jury whether those engines standing inside the house and passing out and in so frequently as they do, and in that place, produce a reasonable and fair apprehension of danger to persons passing to that church, especially to children passing to Sunday-school. You can take that element into your consideration.

To all of which instructions the counsel for the defendant then and there excepted, and the exception was noted at the time.

4. The counsel for the defendant thereupon asked the court to instruct the jury as follows, to wit:

If the jury find from the evidence that the defendant constructed the chimneys or smoke stacks on the repair-shop in question in the
47 usual and ordinary manner, and built them as high as is required by the building regulations of force in the city of Washington, or higher than such requirement, the plaintiff cannot recover for any damage inflicted upon it by smoke from such smoke stacks, and the verdict must be for the defendant.

Which said prayer the court then read and refused the same, and thereupon instructed the jury as follows:

I cannot grant that prayer. If these smoke stacks are constructed ac-

cording to law, and in a skillful way, and yet, notwithstanding all that, the character of the establishment is such as to be a nuisance in the neighborhood, so much the worse for it. It ought not to be there.

To the refusal of said prayer, as well as the instructions given in lieu thereof, the counsel for the defendant then and there duly excepted, and the exception was at the time noted upon the minutes of the court.

5. The counsel for the defendant further prayed the court to instruct the jury as follows, to wit:

The defendant possessed the lawful right to select this location,
48 and to construct, maintain, and use thereon such engine-houses and other works in the city of Washington as were necessary and expedient for the construction, maintenance, and repair of its railroad, engines, &c., and to use and occupy such premises for that purpose; and if the jury shall find from the evidence that the defendant in such occupation and use of the property and management of its business, exercised such reasonable care as a person of ordinary prudence and caution would exercise under like circumstances, the defendant is not liable for any damages, and the verdict must be for the defendant.

But the court refused to instruct the jury as so requested, and proceeded to and did instruct the jury as follows, to wit:

There are a number of objections to that prayer. In the first place I cannot tell you that this company had a right to make that selection. The company, by its charter, undoubtedly has a right to have workshops, and workshops occupy space; but they must select such positions for their workshops as will remove them from a neighborhood where they would be a nuisance.

And, then, no authority has been shown to this company to lay
49 its track and to run its engines across D street. This company had the power, under its charter, to lay its road along Virginia avenue and other streets designated, but it was a trespasser when it passed into D street, and it is a trespasser to-day in using that street. For that reason I cannot say that it had a right to erect this establishment there upon that lot. Possibly it might have a right to put up buildings upon its own property anywhere, but taken in connection with the engines that run in and out, I cannot say that it has the right. It appears to me, however, that the question is not very material in this case, and is not to be considered in fact at all, because the plaintiff can recover only upon damages which it shows that it has sustained. It is an action for a nuisance, and a nuisance caused by the defendant by means of its workshop. It makes no matter to the plaintiffs whether the defendant had the right to run its engines over the street in connection with the shop or not.

Then, there is another objection to it, and that is that this prayer assumes that a party who has constructed a workshop, and a workshop of that kind, is relieved from damages for a nuisance, if the work-
50 shop be a nuisance to the neighborhood. I cannot grant that, because there are some sorts of business—a blacksmith's shop and workshops of this kind are of that character—that they must be nuisances in certain places, however constructed. I must refuse that prayer for the reason that I cannot say to you that because this workshop has been well constructed it is not a nuisance.

Whereupon the counsel for the defendant excepted, as well to the refusal of the court to grant said prayer as to the instructions given in lieu thereof.

The counsel for the defendant thereupon further asked the court to instruct the jury as follows, to wit:

If the jury find from the evidence that the defendant did not use reasonable care and skill in the construction of the chimneys or smokestacks on the engine-house or repair-shop in question, then the plaintiff is entitled to recover interest for three years on the difference between the value of the property from April 1st, 1874, to March 22nd, 1877, as it would have been if the defendant's smoke stacks had been carefully constructed and the actual value *as* reduced by the smoke.

51 But the court refused to grant said prayer, and in lieu thereof instructed the jury as follows:

I understand that to mean this, that the plaintiff's measure of damages would be the interest between the value of property for those three years, if there had been no nuisance there, and the property in its present condition with the nuisance. For example, if the property was originally worth $20,000, and in point of fact the use of the property for three years has only been to diminish the value one-half, then the measure of damages would be the interest upon the difference—that is, the interest upon $10,000. That, I think, gentlemen, is not the measure of damages at all.

The proper measure of damages is such damages as you may think this congregation entitled to for the discomfort which they have been put to in the use of that property. It is not a very definite rule, but it as definite as we can make it.

Possibly, as I said before, the rule might work the other way, and if this were the measure of damages, then if the construction of the
52 workshop and increase of population produced thereby in that neighborhood would have brought about an increase in the value of property, then the plaintiff would not be entitled to any damages, although for three years they might have been subjected to all the discomfort which they claim to have proved. That shows that this rule cannot be the right measure of damages one way or the other.

To which refusal to grant said prayer, as well as to the said instructions given by the court to the jury, the counsel for the defendant then and there excepted, and the exception was noted at the time upon the minutes of the court.

7. The defendant, by its counsel, then asked the court to instruct the jury as follows, to wit:

The defendant was authorized by law to construct, maintain, and use the branch track or railway leading from its main line of tracks on Virginia avenue to its said engine-house or houses, and the plaintiff cannot recover any damages for the construction, maintenance, and lawful use of said lateral track or tracks.

Which prayer was refused by the court, and thereupon the court
53 also instructed the jury, in addition, as follows, to wit:

I cannot grant that prayer, because the defendant has not shown any authority to run its track over D street at all. The prayer asks the court

to instruct you that the defendant was authorized by law to construct, maintain, and use a branch track or railway leading from its main line on Virginia avenue to this engine-house. There has been no evidence of any such authority in the company, and in the absence of evidence to show that such authority was conferred upon the railroad, we must assume that it possesses no such authority, and any company that lays down a railroad track on any public street in the city of Washington without authority is in the daily commission of a violation of a law.

To the refusal of said prayer, as well as to the instructions so given to the jury, the defendant's counsel then and there duly excepted, and the exception was noted at the time.

And thereupon the counsel for the defendant asked the court further to charge the jury as follows:

54 The plaintiff is not entitled to recover damages for any obstruction of D street by the defendant, because it has neither alleged nor proved any injury to itself of a character different in kind from the general injury which it may have sustained in common with the rest of the community by reason of such obstruction; but the court refused to grant said prayer, and told and instructed the jury as follows, to wit:

This prayer is founded upon a misapprehension of the pleadings or upon forgetfulness. Certainly the third count in the declaration contains an averment that the plaintiff had suffered injury from the construction of that track, and from the manner in which it is used, and the plaintiffs allege in that count special injuries, and by special injury we mean an injury which is not suffered in common with the rest of the community, but an injury which is special, belonging to the plaintiffs alone, not in common with others. That is a question of fact which you must decide. The plaintiffs claim that they have suffered special injury by the use of that branch of the road, in consequence, probably, of the nature of their property and the special character of its use.

55 If you find that there has been no such special injury from the use of the branch track on D street as is complained of, then the plaintiff is not entitled to recover on account of the use of the track on the branch road. People have a right, however, to attend church, and children have a right to go to Sunday-school. That is a right upon one side. Upon the other, the railroads claim the privilege of running their roads, and they have that privilege in the city. Some persons might think that it was more important for the public interest to sustain a railroad than to sustain a church—easier to move the church than to move the railroad. But, in regard to this matter, the railroad has not shown any authority to construct its track on D street at all. Although it may have no such authority, if it is in the daily commission of a trespass upon the rights of the public by the use of D street, still the plaintiff has no right to recover, unless they can show special damages different from the kind of damages which the public sustain on account of that nuisance, if it be a nuisance.

To the refusal to grant which prayer, as well as to the instructions given in lieu thereof, the defendant by its counsel then and there excepted, and the exception was duly noted at the time.

56 9. The counsel for the defendant then prayed the court to instruct the jury as follows, to wit:

If the jury should find for the plaintiff, the measure of damages would be as follows, to wit, the plaintiff would be entitled to recover interest, for the three years immediately preceeding the commencement of this action, on the difference between the value of the property on the 22ond March, 1874, or at the commencement of the suit, and what would have been its value if the damaging cause unlawfully created and maintained by the defendant had not existed.

Which prayer was refused, and the court, in lieu thereof, instructed the jury as follows, to wit:

That I have disposed of already; that is not the correct measure of damage, because the defendant would escape all damages if the property taken increased in value notwithstanding the nuisance. The proper rule of damages is what you may choose to allow this congregation for the discomfort and inconvenience which it has been put to by the manner in which that workshop has been used for those three years, if you find it to to have been a nuisance.

57 To which refusal to grant said prayer, as well as to the instructions given in lieu thereof, the counsel for the defendant then and there duly excepted, and the exception was noted upon the minutes of the court at the time.

10. The counsel for the defendant then further prayed the court to instruct the jury as follows, to wit:

The defendant in this case is by law authorized to erect, maintain, and operate such engine-houses, repair-shops, and other works in the city of Washington as are and were necessary and expedient for the construction and maintenance of its railroad, and if the jury shall find from the evidence that the inconveniences complained of by the plaintiff were no more or greater than the natural and probable result of such maintenance of such engine-house and repair-shop, the verdict must be for the defendant.

Which prayer the court refused, and thereupon instructed the jury as follows, to wit:

I may say a word further, gentlemen. There is a maxim of the law expressed in the Latin, which, translated, means that a man is obliged to use his own rights in such a manner as shall do no wrong to his
58 neighbor. That is only expressing in different words the principle announced by Christ himself in the words, "Do unto others as you would have others do unto you." No man stands alone in the community. No man has a right to insist that everybody else shall yield to him their right in the matter of conflicting claims. No man owns property in such a sense as that. A man's right to property is a qualified right always, and the qualification is that each man exercises his own authority in regard to his property in such a way as that no injury shall be done to his neighbor.

A company has the right to build its workshops. The law gives this company the right to construct its workshops, and they cannot carry on these operations without workshops. But that does not give this company the right to go where it pleases to erect its workshops. It must erect its workshops in such places that the hammering and the smoke and

the attendant annoyances which are inseparable from establishments of that kind, shall do no injury to the neighbors.

It is admitted on all hands that such a thing as a tannery
59 would not be allowed in a populous city. But why should it not be allowed? Why should a man not be allowed to have a tannery wherever he pleases? He has a right to buy property. Why is he not to be allowed to dig his vats and carry on his tanning work? Simply because a tannery is necessarily a nuisance and annoys the neighbors. Although it is a lawful, useful, and honorable occupation; yet the tanner must buy his property some place where he can carry on his operations without injury or offense to his neighbors.

So it is in regard to a blacksmith's shop, and in regard to furnaces, and everything of that kind. The world is wide, and places are numerous where these establishments can be erected so that no neighbor will be injured or offended by them.

When Congress conferred upon this company authority to bring its road into the city of Washington, and to establish workshops, it was with the implied understanding that the right should be exercised in subordination to the rights of other people; and Congress could not give any other privilege. It is beyond the power of Congress, even, to grant to any
60 company the privilege of creating nuisances upon its property.

I have read the opinion of the Supreme Court in this case in regard to the La Salle street tunnel under the Chicago River, and it goes very far. In that case there was a public work being constructed. The Chicago River was being tunneled, and in order to construct the tunnel, it was necessary to erect a coffer-dam in the river, and the owner of one of the lots fronting upon the river was put to inconvenience in consequence of the construction of that coffer-dam. He brought his action to recover damages in consequence. The Supreme Court held that he had no right to recover damages, because the work was a public work authorized by law, and the inconvenience to the adjoining property was a necessary result from the construction of that work. That is the extent of that decision, and nothing more.

It is on the same principle that a man who is erecting a house in the city is allowed the privilege of piling up bricks on a public highway and obstructing it. Individuals and the public may be annoyed and put to inconvenience by such obstruction, and yet neither the public nor
61 any individual will have any remedy at law for the injury, because it is a necessary thing; it is in the interest of the public that improvements be made; and if there be no other place upon which to pile the bricks, lumber, and materials necessary in the construction of the building than the public streets, the law requires that the convenience of public and even of private individuals shall yield temporarily for the sake of the public good.

But that case is different from this one. In this case the structure is permanent, and not a mere temporary public or private inconvenience.

To which refusal of said prayer, as well as to the additional instruction so given, the counsel for the defendant then and there excepted, and the exception was duly noted at the time.

The court granted the following prayer on the request of the counsel for the defendant, to wit:

The plaintiff is not entitled in this action to recover anything for damages resulting from unskillfulness or carelessness in the construction of the chimneys or smoke stacks on the repair shops.

62 The court thereupon further instructed the jury as follows, to wit:

I think, gentlemen, that I have now said all that I ought to say, unless it be a word of caution in regard to damages.

Sometimes juries are led off by their sympathies under excitement, and give damages which make it necessary that a new trial shall be granted. A court cannot allow injustice to be done, even by a jury. It is within the power of the court to set aside a verdict for excessive damages, and it is better to avoid that. Still, I do not want to limit you at all in the just exercise of your discretion. But you ought to consider that this congregation was actually in the possession and use of this property during this whole period.

I do not understand that there is any allegation in the declaration of damage in consequence of members of the church being driven off to other places; nothing of that kind; and you ought not to consider that in making up your verdict. You ought to consider that the whole congregation is there to-day as it was when the time covered by the declaration began. I do not know whether that would be the sort of injury which you could very well appreciate or allow damages for. When a man goes off
63 from one congregation he may go to another, and probably he may be the gainer by it, or he may be the loser; you cannot tell. If he goes off he has not suffered any discomfort, except in going off, and he may have been the gainer by that act. You are only to consider the actual damages which those who worship in that church suffered from this nuisance, if you find it to have been a nuisance, during that period.

To which additional instruction the defendant's counsel then and there excepted, and the exception was duly noted at the time.

All of the exceptions hereinbefore mentioned were taken by counsel for the defendant at the time, and noted upon the minutes of the court before the giving of the verdict, and the verdict was in favor of the plaintiff for the sum of $4,500.00. And the counsel for the defendant thereupon presents this his bill of exceptions, containing the directions and instructions of the court as herein stated, and requests the court to sign the same and put his seal thereto, which is accordingly done (now for then) this third day of July, 1879.

A. WYLIE. [SEAL.]

64 Settled by counsel this 1st day of July, 1879.

ENOCH TOTTEN,
For Def't.

J. J. DARLINGTON,
For Pl'ff.

Proceedings before the supreme court of the District of Columbia, sitting in general term, commencing Monday, September 22, 1879. Present, Chief Justice Cartter and Justices Wylie, MacArthur, Hagner, Cox, and James.

WEDNESDAY, *December* 17*th*, 1879.

Session resumed pursuant to adjournment.
Present, Chief Justice Cartter and Justices Hagner and James.

FIFTH BAPTIST CHURCH, PL'FF,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY, def't. } At law. No. 17470.

Argued by Mr. Totten in support of defendant's motion for a new trial, and by Mr. Darlington contra, not concluding.

65 THURSDAY, *December* 18*th*, 1879.

Session resumed pursuant to adjournment.
Present, Chief Justice Cartter and Justices Hagner and James.

FIFTH BAPTIST CHURCH, PL'FF,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY, def't. } At law. No. 17470.

Argued by Mr. Darlington and Mr. Merrick against the motion, and Mr. Totten in support of it, and submitted to the court.

MONDAY, *December* 22*nd*, 1879.

Session resumed pursuant to adjournment.
Present, Chief Justice Cartter, and Justices Hagner and James.

THE FIFTH BAPTIST CHURCH, PL'FF,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY, def't. } At law. No. 17470.

And now again come here as well the plaintiff as the defendant, by their respective attorneys; and thereupon, because it appears to the court
66 here that there is no error, either in the record and proceedings of the special term at law, or in its judgment, therefore it is considered by the court that the judgment aforesaid be, and the same is hereby, affirmed, the defendant's motion for a new trial upon exceptions notwithstanding; and that the plaintiff recover against the defendant the costs of the cause in this court, to be taxed by the clerk, and have execution thereof, and of its recovery in the said special term at law.

67 In the supreme court of the District Columbia, the 24' day of December, 1879.

THE FIFTH BAPTIST CHURCH
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY. } At law. No. . In error.

Know all men by these presents that we, The Baltimore & Potomac

Railroad Company, as principal, and J. D. Cameron, as surety, are bound unto the above-named plaintiff in the sum of ten thousand dollars, to be paid to the said plaintiff, The Fifth Baptist Church, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 30' day of December, 1879.

Whereas the above-named Baltimore & Potomac Railroad Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Baltimore & Potomac Railroad Company shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make good his plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

[SEAL OF COMPANY.] BALT. & POTOMAC R. R. CO.
J. D. CAMERON. [SEAL.]

Sealed and delivered in presence of—
Satisfactory—

J. J. DARLINGTON,
Pl'ff's Att'y.

Approved this 2' day of January, 1880.

D. K. CARTTER,
Chief Justice.

68 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, between The Fifth Baptist Church, plaintiff, and The Baltimore and Potomac Railroad Company, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 23rd day of December, in the year of our Lord 1879, and of the Independence of the United States the 104th.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To the Fifth Baptist Church:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The Baltimore & Potomac Railroad Company is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness, D K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
Ch'f Just.

Due service of the above acknowledged this 24th day of December, 1879.
J. J. DARLINGTON,
Pl'ff's Att'y.

(Indorsed:) 17470. Law. 5th Baptist Church vs. B. & P. R. R. Co.

69 *Authentication of record.—Clerk's certificate.*

Clerk's office, supreme court of the District of Columbia.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 24th day of February, 1880.

[SEAL.]

R. J. MEIGS, *Clerk,*
By J. JAY CAMP,
Assistant Clerk.

Justice's certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 24th day of February, 1880.

D. K. CARTTER, *Chief Justice.* [SEAL.]

Clerk's certificate to justice's official character.

I, Return J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 24th day of February, 1880.

[SEAL.]

R. J. MEIGS, *Clerk*,
By J. JAY CAMP,
Assistant Clerk.

(Indorsement on cover:) No. 202. The Baltimore & Potomac Railroad Company, plaintiff in error, vs. The Fifth Baptist Church. Dist. of Columbia sup. court. Filed 29th March, 1880.

(Stamp:) Office Supreme Court U. S. Filed Mar. 29, 1880. D. W. Middleton, clerk.

105-317

IN THE

Supreme Court of the United States.

No. 202.—October Term, 1882.

THE BALTIMORE & POTOMAC R. R. COMPANY,

PLAINTIFF IN ERROR,

vs.

THE FIFTH BAPTIST CHURCH,

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

ENOCH TOTTEN,

Attorney for Plaintiff in Error.

J. L. Pearson, Printer, 9th and D sts., Washington.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

THE BALTIMORE & POTOMAC RAILROAD COMPANY, *Plaintiff in Error*,
vs.
THE FIFTH BAPTIST CHURCH,
Defendant in Error.

No. 202.

Brief for Plaintiff in Error.

This is a writ of error to the Supreme Court of the District of Columbia. The plaintiff brought its action, May 22, 1877, in the court below to recover damages for an alleged nuisance, claiming $20,000, and the cause was tried before a jury on the 26th day of June, 1879, resulting in a verdict against the railroad company for $4,500. A judgment was entered upon this verdict, and was subsequently affirmed by the general term of that court on appeal.

STATEMENT OF FACTS.

The bill of exceptions (5) contains an elaborate digest of the evidence given on both sides on the trial, to which reference is made here. It is deemed sufficient to say that the plaintiff below owned the property and used it for church purposes as early as 1857. In 1867 the erection of

the present church building was begun, and it has been used for purposes of worship ever since 1868 or 1869. In 1872 the railroad company established a yard and erected an engine-house and repair-shop upon the western portion of the square of ground (493) on which the church building is located, and adjacent to the church. These works of the railroad company occupy about one-half of this square of ground, beginning at Sixth street and running east to the church property. It is the occupation and use of this property by the railroad for these purposes of which the defendant in error complains.

The declaration in the cause sets out three grounds upon which the claim for damages is based. The first count contains averments to the effect that the railroad company has depreciated the value of the church property and has rendered it unsuitable and comparatively valueless for church purposes, by maintaining the yard and by erecting and maintaining its engine-house, and by unlawfully keeping and moving engines therein, and by creating loud noises; by "firing up" the engines and causing smoke, cinders, &c., to be expelled therefrom, which smoke, cinders, &c., enter the windows of the church and annoy the congregation; by ringing bells, blowing whistles, puffing and blowing steam from the engines, and by hammering and making loud noises.

The second count charges damages of the same character, resulting from the construction of a track over D street to the engine-house without legal authority and by stopping engines and keeping them on the track athwart the D-street sidewalk, obstructing passage thereon for unreasonable periods, interrupting the congregation in passing along to church, and there creating loud noises and casting forth dense volumes of smoke, &c., which enter the doors and windows of the meeting-house.

The third count charges that damages of the same nature result to the church corporation, because the railroad company wrongfully and injuriously constructed, or raised

to a height parallel with "the windows of the church, the several chimneys on its engine-house, and used said engine-house and chimneys, and caused to issue from the chimneys dense volumes of smoke, &c., &c., which enter at the windows of the church, diffusing themselves through the church, greatly disturbing and annoying the congregation or society.

The plaintiff (defendant in error here) produced evidence on the trial in support of all the averments in the declaration.

The defendant pleaded "not guilty" and the statute of limitations.

There is no dispute about the erection and maintenance by the defendant railroad of the engine-house and repair-shop. The exact location, height, height of chimneys, distances from the streets, the church, and other points are given in a map produced by the railroad company. The defendant on the trial produced evidence to show that it runs about sixty train each day over its road in Washington City during secular days, and about ten on Sundays; that its employees in the city of Washington number about two hundred, and that they are all skilled men in their particular branches of work and are well behaved; that no more noise than was necessary was made in the operation of the engine-house and repair-shop, and that no work was done there on Sundays except when necessary, and that the necessities of the service had not required the use of the shop more than at the rate of two Sundays per month. That the main or general repair-shop of the company is in Baltimore, where the general work for the railroad is done, and that the only purpose for which the repair-shop in question is used is to make casual or temporary repairs necessary to keep the locomotives, &c., in operation. That the chimneys complained of are actually higher than they are or were required to be by the building regulations of the city of Washington, and that the engine-house and repair-shop are and were in

all respects skillfully and carefully constructed with all the appointments and appliances appertaining thereto. That the bells of locomotives had not been rung and the whistles had not been sounded in the city of Washington since 1872, except in emergencies and when an accident was liable or about to occur; that when engines are brought into the yard the steam was not "blown off," and that it is not necessary to blow off steam to repair a locomotive, unless the boiler thereof is to be repaired. That no engine had been permitted to stand athwart the sidewalk at the entrance to its yard during the period covered by this suit.

A good deal of evidence was submitted by the defendant at the trial to show that the locality in which the works complained of are situated is almost wholly occupied by the inhabitants there for purposes of business, or for purposes other than for dwelling-houses; that such dwelling-houses as are in the locality of the shop are small tenement houses, principally occupied by colored families.

Assignment of Errors.

1. The court, at the trial, erred in the opinion declared to the jury in and by the first prayer (13) granted on the request of the plaintiff's counsel, to the effect that if the smoke and noise created in the yard annoyed, harassed, and put to inconvenience the congregation, the works constituted a nuisance for which the plaintiff might lawfully recover damages. This assignment of error includes also the refusal to grant the first and second prayers asked for by the defendant's counsel and the instructions given in lieu of them.—(16, 17.)

2. The court, on said trial, erred in its opinion as to the measure of damages. This assignment of error applies to the opinion of the court expressed in the second prayer (15) requested by the plaintiff and the instructions which were given with it; the refusal of the court to grant the third (18), the sixth (20), and the seventh (20) prayers

requested by the defendant's counsel, together with the instructions given in lieu thereof, and also that which was voluntarily declared to the jury by the court.—(22.)

3. The court, on the trial, erred in the opinion that the defendant did not possess the right to construct its branch track from the main line to the engine-house, and by instructing the jury that the plaintiff might recover for any damages sustained by the construction and use of such branch track, and in denying the defendant's fifth prayer. —(19.)

4. The court, on the trial, erred in granting the third (15) prayer requested by the plaintiff; and this assignment of error applies to the instructions given in lieu of granting the fifth prayer of the defendant's counsel.—(19.)

5. The general term of the court below erred in affirming the judgment of the circuit court.

Argument and Authorities.

I.

The Baltimore and Potomac Railroad Company was originally chartered by an act of the Legislature of the State of Maryland, approved May 6, 1853. By an act of Congress approved February 5, 1867 (14 Stat., 387), and a supplemental act approved March 2, 1870 (16 Stat., 1), the company was authorized to "extend a lateral railroad" into the District of Columbia.

The act of Congress of February 5, 1867, authorized the company "to exercise the same powers, rights, and privileges . . . as they may exercise . . . under and by intent of their said charter or act of incorporation, in the extension and construction of any railroad within the State of Maryland, and shall be entitled to the same rights, compensation, benefit, and immunities in the use of the said road, and in regard thereto, as are provided in their said charter, except the right to construct any lateral road or roads within said District, . . it being ex-

pressly understood that the said Baltimore and Potomac Railroad Company shall have power only to construct from said Baltimore and Potomac Railroad one lateral road within the said District *to some point or terminus within the city* and county *of Washington, to be determined* in the manner hereinafter mentioned."

The 12th section of the act of Maryland contains the grant of corporate powers to the company, and, amongst other things, provides that "the president and directors of the said company shall be, and they are hereby, invested with all the rights and powers necessary to the construction, working, use, and repair of a railroad from some suitable point in or near the city of Baltimore, ... with such branches at any point of said railroad, not exceeding twenty miles in length, as the said president and directors may determine. The said road when completed not to be more than thirty-six feet wide, except at or near its depots or stations, where the width may be made greater, with as many tracks as the president and directors may deem necessary; and the said president and directors may cause to be made, or may contract with others for making, said road or any part of it; and they or their agents, or those with whom they may contract or their agents, may enter upon and use and excavate any lands which may be wanted for the site of said road or the erection of warehouses or other works necessary for the said road or for its construction and repair, and that they may build bridges, fix scales and weights, lay rails, may take and use earth, gravel, stone, timber, or other materials which may be needed for the construction and repair of the said road or any of its works, *and may make and construct all works whatever which may be necessary and expedient in order to the proper completion and maintenance of the said road;* and they may make or cause to be made lateral railways in any direction whatever from the said railroad," &c., &c.—(R., p. 12.)

The second section of the act of February 5, 1867, pro-provides the means of obtaining the property of private

persons for the use of the road by making compensation, but proceeds to declare that nothing in the act contained shall be so construed as "to authorize the entry by said company upon any lot or square, or upon any part of any lot or square, owned by the United States, within the limits of the city of Washington, for the purpose of locating or constructing the said road, or of excavating the same, or for the purpose of taking therefrom any materials, or for any other purpose or uses whatsoever; but the said company in passing into the District aforesaid, and constructing the said road within the same, *shall enter the city of Washington at such place and shall pass along such public street or alley to such point or terminus within the said city, as may be allowed by Congress upon presentation of survey and map of proposed location of said road.*"

That act having withheld the particular grant of power to the company to enter the city by any definite line or street until a survey and maps should be presented, on the 18th of March, 1869, a supplementary act was approved (16 Stat., 1) authorizing the company to enter the city of Washington with its railroad by one of two routes, as the company might elect.

The line of entrance secondly described and submitted by the act was subsequently adopted, by which the road was brought to and along Virginia avenue in front of the church property, "to the intersection of south C and west Ninth street."

The controversy in this case is not in relation to the manner of using and carrying on these works by the railroad company, but it proceeds upon the theory that the company has no lawful power to maintain and use this yard and engine-house and the repair-works in any manner whatever, even with the utmost skill and prudence. The very idea of using these "works" involves the moving back and forth of locomotive-engines propelled by steam, and the creation and expulsion of smoke, steam, &c., from the engines as well as the repair-shop, and the continuous making of more or less noise.

The church corporation asserts that it has a right to the quiet enjoyment of its property without the presence of these disturbing circumstances, and that the maintenance of such works adjacent to its property is a nuisance subject to the condemnation of the law, and for which it has a right to maintain its action.

This is not akin to a controversy growing out of the obstruction of a public street in front of a private citizen's property, upon and over which he has an easement, but it is a declaration that the defendant railroad company has not a lawful right to do that on its own private property at this particular point, which the statute says it may do at any point along the authorized line of its main road within the District of Columbia, wherever, in the opinion of it president and board of directors, it "may be *necessary and expedient* in order to the proper completion and maintenance of the said road."

By the act of 18th March, 1869, the company was authorized to pass along Virginia avenue to the southern terminus of the prescribed line; this terminus was by that act fixed at the junction of west Ninth and south C streets and Virginia avenue. This being the end of the road the statute must have been passed with the expectation, in the legislative mind, that depots, stations, engine-houses, and other works would be constructed at or near that point. Power to construct and maintain a railroad necessarily includes power to build depots, stations, side-tracks, engine-houses, switches, repair-shops, &c., &c.—(Enfield Toll Bridge Co. vs. Hartford & N. H. R. R. Co., 17 Conn., 454; Black vs. Phil. & R. R. R. Co., 58 Pa. St., 249; Speer vs. R. R. Co., 56 Pa. St., 325; Turnpike Co. vs. Camden & Amboy R. R., 2 Harr., N. J., 314.)

It will hardly be contended that engine-houses and repair-shops are not "*necessary and expedient*" in the operation of a railroad. Locomotive-engines when not on the road must be protected from exposure to dampness and storms; when slight accidents happen to them whilst on a

journey, repairs, temporary or permanent, must be made without delay to keep them in proper condition to perform the service required of them in the speedy movement of trains. The company could not reasonably nor practically be forced to make another long journey with a crippled locomotive in order to reach a place of shelter or a repair-shop for the purpose of securing slight but needful repairs. The location of these works must necessarily be where they will best accommodate the requirements of the business of the road.

To require the company to locate its engine-house or repair-shop beyond the limits of this city would not be reasonable, and this cannot be supposed to have been the intention of the legislature. It might with equal propriety and force be said that the repair-shop in Baltimore is sufficient, and that an engine-house in or near this city might be wholly dispensed with. The power of determining whether or not such works are necessary and expedient, and where they shall be erected, is by the statute confided to the president and board of directors of the company, and when they have once exercised that power in good faith, their judgment is not reviewable, but is conclusive on all authority in this District, except that of Congress. (Ford vs. Ch. & N. W. R. W. Co., 14 Wis., 663; N. Y. & H. R. Co. vs. Hip, 46 N. Y., 546; Giesy vs. R. R. Co., 4 Ohio St., 308; Brainard vs. Clapp, 10 Cush., 6; Curtis vs. R. R. Co., 14 Allen, 55; Pierce on Railways, 148, 160, 494; Hawley vs. Steele, 6 Ch. Div., 521.) It would be difficult to select a location for these works in the city of Washington, or, indeed, in any city, which would be satisfactory to every property-owner in the vicinity; some person or persons would be sure to complain of the noise and smoke. These considerations, when this line was traced and established over this wide street and through this particular portion of the city, must have received due attention from Congress, as well as all these other attendant questions. If the powers granted by the Maryland charter

were too broad, as to the location, construction, and maintenance of these "works," which are indispensable to the successful management of the railroad company, those powers would have been limited by Congress.

It is significant and instructive, in reference to this question, to observe the watchful care with which Congress guarded the rights of the public in this legislation. By the original act of Congress (February 5, 1867) the legislature withheld from the company the power to proceed at any point in the city of Washington until a survey and map of a line or lines was made and presented, and then, by the concluding section, reserves to itself absolute power over the franchise and the management of the railroad for all time to come.

The last section of the act provides that "nothing herein contained shall be so construed as to prevent Congress . . . . from enacting such rules and regulations prescribing the speed of cars or carriages passing over said road, *and any other matters* relating thereto, *necessary for the security of the persons and property* of the inhabitants of the District, in such manner as to the present or any future Congress may seem expedient." It would seem from this language that Congress intended to reserve unto itself the exclusive authority of determining when the property of the residents of the city was not sufficiently protected, and of prescribing the necessary regulations for the better security thereof.

If I am correct in the conclusion that the defendant railroad company was authorized by the statute to locate and maintain these "works" at this point, then the next question which arises is whether or not this legislative authority is a protection against an action for damages of this nature; or, in other words, does the defendant railroad company here occupy a different attitude from that which a private person would occupy who had erected and maintained like works on those premises as a private enterprise? It is contended in behalf of the plaintiff in error

that the statutory authority being found for erecting and maintaining these "works" in aid of the business of the company, that any injury which their presence and operation inflict upon neighboring property is *domunon absque injuria*. If the railroad company did not exceed its powers and did not exercise them wantonly or unlawfully, it cannot be mulcted in damages. No action will lie and no recovery can be had for doing that which the law authorizes the party to do, and that cannot be adjudged a nuisance and be held unlawful which the law declares to be lawful. (N. Y. & E. R. R. Co. vs. Young, 33 Pa. St., 175; Renwick vs. Morris, 3 Hill, 621; Bridge Co. vs. Kirk, 46 Pa. St., 112; Northern Tr. Co. vs. Chicago, 99 U. S., 635; Angell on Highways, § 237; Addison on Torts, § 1,040; Porter vs. North Mo. R. R. Co., 33 Mo. 158; Navigation Co. vs. Coons, 6 Watts & S., 101; Henry vs. Pittsburg Bridge Co., 8 W. & S., 85; Radcliff vs. Brooklyn, 4 N. Y., 195; Billinger vs. R. R. Co., 23 N. Y., 42; Moyer vs. R. R. Co., 88 N. Y., 351.)

The case of Hatch vs. R. R. Co., (25 Vt., 49,) is a leading and well considered case on this subject. There the plaintiff was the owner of property in Burlington on which he maintained a bakery, store, and other valuable buildings, and carried on a bakery and mercantile business. The property was located upon the corner of two streets, and the railroad company constructed its road along one of these streets. The plaintiff complained that the defendant dug ditches and constructed an embankment in front of his premises, and that his premises by reason of the embankment was overflowed during freshets, and that teams could not pass along the streets because of the presence of the railroad. That great numbers of trains passed over the road daily, and that his customers were driven away or compelled to go elsewhere to trade, and that the value of his property was greatly depreciated, and that he was greatly injured. The court held, Redfield, Ch. J., delivering the opinion, that the plaintiff

could not recover. The court distinctly declared that a railroad company operating a railroad under the authority of an act of the legislature is not liable for necessary consequential damages to premises not *taken* by the company. (See, also, Cleveland R. R. vs. Speer, 56 Pa. St., 325, and Black River Impt. Co. vs. La Crosse B. & Tr. Co., (Sup. Court Wis., 1882,) — N. W. Reporter, 443.)

Congress is clothed with power "to exercise exclusive legislation in all cases whatsoever" within this District; "to regulate commerce with foreign nations and among the several states, and with the Indian tribes," and with many other powers, all of which were bestowed on the general government or Congress to "establish justice, insure domestic tranquility, provide for the general welfare," &c., &c. If there is no other source of power to enable Congress to authorize this company to establish and maintain this engine-house and repair-shop at this point, plenary authority is found in the constitutional power to regulate commerce between the states, and the constitutional duty to provide for the general defence. This railroad company is not a private but a public, or at least a quasi public institution, and the privileges and franchises bestowed upon it are for the public welfare and convenience as well as for the private gain of the stockholders, and they are exercised for the interest and benefit as well for the whole people as for the railroad company itself. Railroad and turnpike companies, so far as the question of constructing and maintaining rail and wagon roads is concerned, are public agents and trustees.—(Hays vs. Rusher, 32 Pa. St., 9; U. S. vs. Railroad Bridge, 6 McLean, 517; Shorn vs. Starett, 4 Ohio St., 494; Cleveland R. R. vs. Speer, 56 Pa. St., 334; 9 Casey, 180; 4 Harris, 193; Henry vs. The Pittsburg Bridge Co., 8 W. & S., 85.) Upon no other principle can the legislative power authorize them to exercise the right of eminent domain by taking "private property" for "public use." Private property cannot be taken for private use—the property of one citizen cannot be taken under the pro-

visions of the various constitutions, and given to another private citizen.—(Osborn vs. Hart, 24 Wis., 89; Vanhorne vs. Dorrance, 2 Dallas, 312; Stockton vs. Stockton, 41 Califor., 147; Addison on Torts, § 1,040.)

This railroad was undoubtedly intended by Congress to form a national line of transportation for commercial purposes from the North to the South, over which the commerce between the several states, north and south, was to be conducted, and which would in the event of domestic or foreign wars constitute an important element of strength in providing for the common defence of the nation; if this repair-shop and engine-house are reasonably necessary, expedient, and convenient in carrying on the business of the railroad, they are so needful and expedient for the good of the whole people. There is no more familiar doctrine than that where private rights are in conflict with the public interest, convenience, or safety, the former must always yield.

The public streets of the city of Washington are owned and held by the United States in absolute fee-simple, not for the benefit of the few lot-holders in the city of Washington, but for the benefit of all the people of the United States, (Van Ness vs. City of Washington, 4 Peters, 232,) and, therefore, these streets are under the absolute dominion and government of Congress, unrestricted by any right of an individual lot-holder whose property may front upon the street. In some cities there are great disputes as to the different rights and as to the extent of such rights of abutting owners to easements in and over public streets. In Pennsylvania the supreme court has declared that the state has absolute dominion over the streets.—(Phil. & T. R. R. Co., *matter of*, 6 Whar., 25; Faust vs. Railway Co., 3 Phil. Reports, 164; Com'th vs. Erie & N. E. R. R., 3 Casey, 339.) This doctrine has been followed in many states, but the decisions in other states are somewhat conflicting and appear to leave the law somewhat in confusion. Yet it is apprehended that this conflict is more

apparent than real and grows out of the difference in the dedication of public streets in the cities of different states to public uses, and the difficulty in applying principles to facts in some cases.

But whatever the law may be in other jurisdictions, it seems plain that the national legislature has power to authorize the use of any street, or any number of streets, or any part of any street or streets, of the city of Washington, to be used exclusively for railroad purposes, and the grantees of such power cannot be compelled to respond in damages for inconveniences or consequential injuries which may be put upon abutting owners by passing locomotive-engines or trains, nor for dust, smoke, cinders, or noise resulting from such use of the street for railroad purposes to the annoyance of citizens.

It cannot be successfully denied that Congress can legalize the presence of smoke, cinders, noises, railroad trains, and locomotive-engines on a public street in the city of Washington, where it is conceded all persons may pass and repass at their will and pleasure, if not interrupted by legalized obstructions. This being so, it would be strange indeed if the same inconveniences cannot be legalized by Congress for railroad purposes upon premises adjoining the railroad, which are the private property of the corporation operating the railroad, and which are used in connection with the conduct of its business. If the right to pass through and over this property belonging to the company could be granted, why could not the right be granted also to stop and remain stationary thereon? The difference might be but slight in the character and extent of the noise, smoke, and other inconveniences, depending upon the number of passing trains on the one hand and on the extent of yard on the other.

II.

The rule adopted by the court below as to the measure of damages was erroneous.

The court told the jury more than once that they might assess damages against the railroad company and in favor of the church corporation for the personal inconveniences and discomforts suffered by the individuals worshiping in the church. After granting the second prayer to the plaintiff, and in addition to it the court told the jury (15) that this action was "*brought by a congregation duly incorporated, and they have brought an action to recover damages for their inconvenience and discomfort in consequence of the acts of the defendant. It is the personal discomfort, more than anything else, which is to be considered in regard to the assessment of damages.*" The jury was also told that (15) "*the congregation would be entitled to recover damages* (although their property might have increased in value) *because of the inconvenience and discomfort they have suffered from the use of the shop;*" in other words, that it was not a question of injury to real estate, as stated and claimed in the declaration, but a question of personal discomfort and inconvenience to individuals who attended divine worship in the church. This doctrine was strictly adhered to all through the case; it will be found in the directions given to the jury upon refusing the third (18) and sixth (20) prayers requested by the defendant's counsel. The court told the jury, in denying the third prayer requested by the defendant's counsel (18), that the proper measure of damages was "such damages as you may think the congregation entitled to for the *discomfort which they have been put to* in the use of that property; and, finally, the jury was told (22) that they were "*only* to consider the actual damages which *those who worship in that church suffered from this nuisance*, if you find it to have been a nuisance during that period."

Upon this doctrine this corporation had a right in this action to recover for damages inflicted upon persons who attended religious exercises there; if an engine passing into or out of the yard had crushed a foot or an arm of one going to or coming from the church, or if a valuable shawl

or other garment had been injured by smoke or other substance thrown into the church from the yard, this corporation might recover damages for it. And if any person who worshiped in that church, of sensitive nerves, was annoyed and rendered uncomfortable by the blowing off of steam, by hammering, or by the rumbling noises or puffing and explosive sounds produced by a locomotive passing into or out of the yard, the jury were permitted to estimate and charge unlimited and arbitrary damages against the defendant and in favor of the plaintiff therefor.

Upon these instructions, if the evidence showed that the persons who attended the church were, by the noise of hammering, or of whistling, or of expelling steam, prevented from hearing the sermon or the prayers of the preacher, or the singing of the choir, the jury were authorized to assess damages against the defendant.

It is instructive, in this connection, to compare the tenor of the directions of the court to the jury with the averments in the declaration. The first count, after reciting the discomforting acts and noises complained of, concludes with the charge that the defendant railroad "did, and hath, and still doth, disturb, annoy, and molest the said religious society or congregation while engaged in worship as aforesaid, *by means whereof the value of the said lot and premises of the plaintiff was and is greatly depreciated, and the said meeting-house was and is rendered unsuitable and comparatively valueless as a house of worship, and incapable of being used in so advantageous and beneficial a manner as it otherwise might and would have been used*, to the great damage of the plaintiff in the sum of $20,000, and, therefore, it brings its suit."

The second count, after the acts complained of are set out, concludes with the allegation that these unlawful acts were done by the railroad company "to the great inconvenience, hindrance, discomfort, interruption, and annoyance of the said society or congregation, and *to the great*

depreciation in value of the said premises, rendering the said meeting-house unsuitable and unfit for the purpose for which the same was erected and was and is used, and to the great damage of the plaintiff in the sum of $20,000, and, therefore, it brings its suit."

The third and last count, which contains the complaints in reference to the improper and unskillful construction of the chimneys on the engine-house, and the unlawful issuing and expelling of smoke, cinders, steam, &c., therefrom, after averring the alleged injurious circumstances, closes with the allegation that all these acts were wrongfully done by the defendant "to the great disturbance, interruption, discomfiture, and annoyance of the said society or congregation, *and the said property of the plaintiff has been thereby greatly depreciated in value, and the plaintiff has been thereby prevented from having so beneficial a use and occupation thereof as it otherwise might and would have had*, to the great damage of the plaintiff in the sum of $20,000, and, therefore, it brings its suit."

The jury could not be expected to entertain a very intelligent or just conception of this case after the court had told them that this was an action "brought by a congregation" . . "to recover damages for *their inconvenience and discomfort* in consequence of the acts of the defendant." It should seem that such an action was the very action which a church corporation could not maintain. It is difficult to conceive how a religious corporation of this character could, by any possibility, incur damage through the instrumentality of a nuisance, except as to the value of its property or the use of it.

The declaration proceeds upon the idea and charges that by means of these discomforting and annoying acts of the defendant, the occupation of the building for church purposes is less convenient and beneficial than it otherwise would be, and that by means thereof the property is depreciated in value, for which depreciation a recovery of damages is sought in this action. The pleader kept it

steadily in mind, from the beginning to the end of his declaration, that he wished to recover for the unlawful depreciation of the value of the real property. It is plain that it never occurred to his mind that a church corporation could recover damages for personal discomforts because the owner of adjoining property had engaged in a business which produced annoying noises, smoke, cinders, and disgusting odors. A corporation possesses no ears to be shocked with discordant sounds, and no nostrils to be offended with foul or stifling odors. The court, however, appears to have taken an entirely different view of the subject-matter for which damages might be assessed in this controversy. The depreciation in the value of the property, according to the idea which the court had of the law, did not form the basis for the computation of damages, but the inconvenience and discomfort which the congregation had suffered furnished the basis (15); and carrying out this idea the court actually directed the jury that in making up the amount of damages they were to consider "only" the "*actual damage* which *those who worship* in that church *suffered from this nuisance.*"

Thus the court not only lost sight of the true ground for assessing damages, but compelled the jury to limit their inquiries to the question of the personal discomforts and annoyances of persons attending service. No distinction was made between regular members of the society and those who were only occasional visitors at the church, so that any discomfort from smoke, cinders, or noise, suffered by a casual visitor, would go to swell the amount of damages against the defendant.

In the case of Owen vs. Henman, (1 W. & S., 548,) an action at law was instituted to recover damages for a disturbance of the plaintiff while engaged in religious exercises in a church, by making loud noises in singing, &c. The court held that such an action would not lie, and in its opinion said:

"The injury alleged is not the ground of an action. He claims no right in the building or any pew in it, which

has been invaded. There is no damage to his property, health, reputation, or person. He is disturbed in listening to a sermon by noises. Could an action be brought by every person whose mind or feelings were disturbed by listening to a discourse, or any other mental exercise, (and it must be the same whether in church or elsewhere,) by the noises, voluntary or involuntary, of others, the field of litigation would be extended beyond endurance. The injury, moreover, is not of a temporal nature; it is altogether of a spiritual character, for which no action at law lies."—(See, also, Williams' Case, 5 Coke, 13.)

In a more recent case the Supreme Court of Pennsylvania has given much consideration to this question. In Sparhawk vs. R. R. Co., (54 Pa. St., 401,) an application was made for an injunction to restrain a railroad company from running its cars alongside of a church on Sunday; the court of original jurisdiction granted the injunction, but on appeal the supreme court held that there could be no injunction. The court in its opinion says:

"The bill charges an injury, not physical, but mental or spiritual. One which neither deprives the body of rest, refreshment, or health. That this is the nature of the complaint is most evident, from the fact that the disturbing causes are the same, and no greater, on Sundays than on other days, and of this there is no complaint. How are we to determine whether the mind is injuriously disturbed or not? To some it is granted that there may be annoyance in the passing of cars on Sundays. To others it would be but an agreeable sound. To many it would be an annoyance because of their views of the Sabbath. But, as already said, that is not in this case for want of power in this form, to take cognizance of it. It is not possible, in my judgment, to establish a material injury, where alone at most the mind is disturbed without the slighest bodily effect or interference with ordinary comfort. It is but an inconvenience incident to the situation, and not the subject of an adjudication in equity. * * * * *

"Progress will not be stopped to accommodate anybody's convenience. It must yield in consideration of our interests in the thousand advantages in other respects of city life. We should not attribute the fault in our own position to faults in others.

"There is undoubtedly more noise affecting churches and residences in a city than in a country, but this is to be expected, and courts must regard this if parties do not. If the substance of the complaint be an inconvenience, it is a matter with which, ordinarily, courts cannot interfere. In their civil jurisdiction they have nothing to do with it; and it seems to us that this is one of that kind. We have referred to the fact that there are no complaints of interruption or disturbance of religious exercises, in public or private, in churches or in private residences, on secular days, along the line of this railway. We have a right to regard this as evidence that they are not disturbed by the mere running cars, and would not be if cars were run on Sundays as on other days. We ought to presume that both public and private worship is performed on week days as well as on Sundays along that line."

It is submitted that if the plaintiff below has a right to recover at all, it is to recover only for the temporary depreciation of the value of the real estate; that nothing, in any event, can be recovered in this action for personal discomfort, inconvenience, and annoyance, as such, which may have been suffered by the individual persons who happened to attend divine services at this church.

The damages inflicted in this case, if any, did not go to the destruction or permanent injury of the property of the church corporation. The wrong may be apportioned from time to time and separate actions be instituted to cover successive periods of time; if the "works" should be removed the injury would cease. Such damages are temporary and not permanent. The court, on the trial, committed an error, very material and injurious to the defendant, by instructing the jury that the company's works were "permanent," and "not a mere temporary" inconvenience (21).—(Troy vs. Cherokee R. R. Co., 23 N. H., 101; Wood on Nuisances, 889 (§ 856); N. Y. & E. R. R. Co. vs. Stone Road, 51 N. Y., 573; Wooster vs. Man'fg Co., 40 Me., 159; Troy vs. R. R., 3 Foster, 83.)

If the church congregation is entitled to recover damages it can recover only for the lessening of the ben-

eficial use of the property for the purposes of a place of worship, and the true rule of damages applicable to the case is the interest on the difference between the value of the use of the property, during the period covered by the action with the damaging cause, and what it would have been without the damaging cause.—(See Sedgwick on Meas. of Damages, (550,) 693, n.; Frazer vs. Schœlkoff, 53 N. Y., 152; Ford vs. R. R. Co., 14 Wis., 668; Blaesch vs. R. R. Co., 43 Wis., 195; Carl vs. Sheboygan R. R., 46 Wis.; Ottawa Gas Co. vs. Graham, 28 Ill., 78.)

III.

The third assignment of error relates to the instructions of the court touching the construction and use of the branch track leading from the main track on Virginia avenue to the works in question.

It will readily appear from an inspection of the maps that the whole of the space in front of the church property belongs to and forms a part of Virginia avenue. It is true that D street, on either side of this lateral track, merges into Virginia avenue; if this avenue was not there it might be a part of D street, but the avenue being there, it is Virginia avenue, on the principle that the greater includes the less. It cannot be argued successfully that this siding cuts D street. It will appear from an inspection of the map that it was the design of the engineer who made the plan of the city that D street at this point should wholly lose its identity in the avenue. Proceeding from west to east, D street ends abruptly at Sixth street, and practically has no place upon the plan of the city until we reach the east line of 4½ street; and even if we count the small flat-iron shaped piece of ground marked on these maps, D street still falls short of the siding running into the engine-house. There is one circumstance as to the question of these two streets about which there can be no doubt: Virginia avenue continues uninterruptedly from east to west

beyond this disputed point, whilst D street, running from east to west, abruptly ends either at 4½ street or somewhere about the line of this branch track. It cannot be disputed that there is a space of considerable length at this particular locality between the north and south curb-lines of Virginia avenue, where there is no such street as D street, and also that this space constitutes a part of Virginia avenue. The language of the charter is sufficiently broad to cover all this. If the company possessed the right to erect and maintain this engine-house and shop, it possessed the right to run such lateral tracks into it from the main track as are necessary for its proper use. The Maryland charter (sec. 13) provides "that the president and directors, or their agent or agents authorized by them, may agree with the owner or owners of any land, earth, or materials, or any improvements which may be wanted for the construction or repair of any of said roads, or any of their *works*, for the purchase and use and occupation of the same." If they cannot agree with the owner, the statute provides ample means for condemnation and compensation.

The act of Congress of February 5, 1867, (sec. 2,) provides that before the company shall "take any lands," &c., &c., within this District, the assent of the owner shall be first obtained, or proceedings for condemnation shall be resorted to. It will thus be seen that ample power was given to the company to acquire lands for such "works" as might be necessary and expedient. It certainly would not be reasonable to suppose that the legislature intended to grant to the company the empty power of acquiring lands, and to construct and maintain "works" thereon for the purposes of the company's business, without at the same time giving the company the means of enjoying its property by obtaining access to such "works." It must be considered that, when the legislature authorized the company to acquire property along the line of its road within the District, for its stations, depots, and works, it was the intention to authorize the company to pass over

the public streets, the property of the United States, in such manner as to secure reasonably expeditious and convenient access to such acquisitions; and this will be the construction unless negative words are contained in the charter. The only prohibition contained in the statute as to using public lands may be found in the third section of the act of February 5, 1867; this clause prohibits the company from entering upon or using any *lot or square* or *any part of a lot or square*, owned by the United States, "within the limits of the city of Washington." It appears to be the settled doctrine of the courts that when the legislature authorizes a public improvement to be constructed by a corporation, the making of which will necessarily require the use or taking of the public lands, and no negative words are contained in the charter, and no provision made for making compensation to the state for such public lands to be taken, that the right to use or take the lands for such purpose is constructively conferred upon the corporation without making compensation therefor.—(Black River Impt. Co. vs. La Crosse Booming and Tr. Co., (Sup. Ct. Wis., 1882,) — N. W. Rep., 450; R. R. Co. vs. State, 3 Ind., 421; Railroad Co. vs. Railroad Co., 8 C. E. Green, 157; Davis vs. R. R. Co., 1 Sneed, 94; U. S. vs. Railroad Bridge Co., 6 McLean, 517.)

But if, as the court told the jury, the company is a trespasser to-day in using this street, it is not a subject-matter of legitimate damages to the plaintiff; the general government alone can make complaint. If the defendant railroad company did not possess the power to extend its track as claimed, the plaintiff has alleged no damages in its declaration special and peculiar to itself and differing in kind from the damages caused by the maintenance of the track to the whole people in that locality. The plaintiff must allege and prove injury special and peculiar to himself, and of a kind different from the injuries sustained by the community or individuals generally situated like himself, in reference to the alleged nuisance. To be recoverable,

the damages must be peculiar and special, as distinguished from the injury and damage to the general public. It is immaterial that he may have suffered in a greater degree or more frequently than his neighbors. The damage must not only be special, but it must be shown by *specially alleged facts* as distinguished from general damages which necessarily follow the acts in the declaration complained of. The damages must be definable and defined, specified and described, in the declaration, and established by the proofs. The principle of the ancient common law governing in private actions instituted to recover special individual damages caused by the obstruction of a public highway, creating a public nuisance, as laid down by Coke, was in these words:

"If a man be disturbed to go over a common highway, or if a ditch be made across it so that he cannot go, yet he shall not have an action upon his case; and this the law provided to prevent multiplicity of suits; for if any one man might have an action, all men might have the like, unless any man hath a particular damage; as, if he and his horse fall into the ditch, whereby he received hurt and loss, then for this special damage, which is not common to all, he shall have an action upon the case."

This rule has been somewhat extended since Coke's time, and it will now sustain an action by any person who has sustained a special damage peculiar to himself, either to his person or property, direct or consequential, from a public nuisance, whether arising from the obstruction of a highway or from any cause.—(Wood on Nuisances, § 621.) But the damages must be actual, present damages, as distinguished from those resting in "contemplation." (Ibid., § 632.)

In the same work (page 890, § 858) it is laid down that "damages, which, although the natural, are not a necessary consequence of the nuisance, must be specially alleged, or no recovery can be had therefor. General damages are such as are the necessary consequences of an act. (Vanderslice vs. Newton, 4th N. Y., 130; 18 Minn., 92.)

Damages to sustain the *per quod* must be something not merely differing in degree, but in kind, from that which must be deemed common to all.—(Thayer vs. Brown, 19 Pick., 514; Proprietors of Quincy Canal vs. Newcomb, 7 Metcalf, 283.)

The plaintiff must set forth special damages. It will not be sufficient fer him to state merely that defendant obstructed the highway in such a manner as that he could not pass through it. He must fail unless he goes on and states that he has sustained a particular injury, different in its character from that which is common to all the citizens. —(Stilson vs. Paxon, 19 Pick., 161; O'Brien vs. St. Paul, 18 Minn., 180.)

So strictly is this rule held, that where one sustains an injury in common with the public, although from the circumstances in which he happened to be placed he may suffer more frequently or more severely than others, he has no individual right of action. It is only when he suffers some special damage, differing in kind from that which is common to others, that a personal remedy accrues to him.—(Barnard vs. Conn. River R., 7 Cush., 510.)

The plaintiff may feel the inconvenience of the nuisance complained of more than any one else, in consequence of the proximity of his lots and buildings; still it is a damage of like kind and not in its nature peculiar or specific. The creation of a public nuisance by placing an obstruction in a highway, can only be punished and suppressed by a public prosecution; and though a man who lives near it and has occasion to pass it daily, suffers a damage altogether greater than one who lives at a distance, he can have no action. But if he suffers a peculiar damage not common to the others, as by driving upon such an obstruction in the night-time and injuring his horse, he may have his action.—(Smith vs. Boston, 7 Cush., 255 and 256. See, also, Stetson vs. Faxon, Ib., 147; Proprietors of Quincy Canal Co. vs. Newcomb, 7 Met., 283; Barnard vs. Conn. River R. Co., 7 Cush., 510; Smith vs. Boston,

Ib., 255; Fall River Iron Co. vs. Old Colony R. R. Co., 5 Allen, 224; Paine vs. Dart, 7 Cow., 609; Wood on Nuisances, secs. 621, 858, 873, 829; Houck vs. Wachter, 34 Md., 265; Osborn vs. R. R. Co., 5 Blatchf., 366; Currier vs. R. R. Co., 6 Blatchf., 487; Georgetown vs. Canal Co., 12 Peters, 91; Pierce on Railways, 270, and authorities cited.)

IV.

The court introduced into the case a foreign element by declaring to the jury, in the third prayer of the plaintiff (16), that they might estimate damages for the alleged diminution of income caused by interrupting the children who attended the Sunday-school at the church building.

There is no averment in the declaration upon which this instruction can be supported. The action is based upon the theory that the house was erected and used for the purposes of a place of "public religious worship;" not for the purposes of a school-house. Even if the proper averment had been made in the declaration, no recovery could be had for such an injury. The obstruction of that street, if unlawfully created, was a public nuisance, for which a private action cannot be maintained, unless special and peculiar damages, of a kind differing from those inflicted upon the people generally in that vicinity, shall have been alleged in the declaration and proved at the trial. This doctrine was abundantly established by citations of authorities in the preceding paragraph.

It is submitted that the judgment should be reversed.

ENOCH TOTTEN,
Atty. for Plaintiff in Error.

OFFICE SUPREME COURT U. S.
FILED
MAR 14 1893
JAMES H. McKENNEY, Clerk.

108-317

IN THE

Supreme Court of the United States.

No. 302. October Term, 1892.

THE BALTIMORE & POTOMAC RAILROAD COMPANY,
PLAINTIFF IN ERROR.

vs.

THE FIFTH BAPTIST CHURCH,
DEFENDANT IN ERROR.

Brief for Defendant in Error.

J. J. DARLINGTON,
Attorney for Defendant in Error.

R. T. MERRICK, Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

THE BALTIMORE & POTOMAC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE FIFTH BAPTIST CHURCH, Defendant in Error.

No. 202.

Brief for Defendant in Error.

The defendant in error recovered judgment in the Supreme Court of the District of Columbia against the plaintiff in error in an action on the case for a private nuisance. The case is here upon certain exceptions on behalf of the plaintiff in error to instructions given to the jury by the justice before whom the cause was tried, the instructions in question having been sustained, and the judgment affirmed, by the court in general term.

STATEMENT OF FACTS.

The plaintiff below, a religious congregation incorporated under the General Incorporation Act in force in the District of Columbia, has owned and used its premises, situated in the City of Washington,

as a place of public worship, since the year 1857, and has used its present church edifice as its house of worship since 1869. In the year 1872, the defendant below erected, and has since maintained, upon the immediately adjoining premises, an engine-house for housing, and machine-shops for repairing, its locomotives.

Said plaintiff, on the trial, produced evidence to show that it protested against the location of the defendant's said works where they now are, when the ground was first broken for their erection, but that said defendant not only proceeded to erect them there, but placed them upon the building line of its premises, as near the walls of the church as it could locate them; that it constructed upon its said engine-house sixteen smoke-stacks, lower in height than the church windows, although said smoke-stacks could have been raised as high as the roof of the church at slight cost, and with the effect of improving their draft; and that the nearest of these smoke-stacks is less than sixty feet from the windows of the church, the others being in a semi-circular curve, at gradually increasing distances. That the Sunday-school exercises of the church were held every Sabbath morning, at 9 o'clock, and that a part of its income was derived therefrom, varying in amount with the attendance; that preaching was had every Sabbath at 11 o'clock, A. M., and again at about 8 o'clock, P. M., prayer-meeting every Wednesday evening, and, at intervals, protracted religious meetings every evening in the week except Saturday; that during the entire period covered by the suit, all of said meetings were habitually interrupted and disturbed by the hammering noises made in the defendant's said shops, the rumbling of its engines passing in and out, and the blowing off of steam from said engines; that, at times, by reason of these noises, nothing that was said could be heard, even in those parts of the church most distant from the shops; that the operation of blowing off steam from the engines, occupying from five to fifteen minutes in duration, frequently compelled the pastor to suspend his remarks, and that this operation was of habitual occurrence, both in the day and at night, on Sundays as well as on other days; and that in the summer time, when the church windows were opened for air, smoke, cinders and dust, accompanied by an offensive and disagreeable odor, were thrown in considerable quantities from the smoke-stacks of the engine-house, through said windows, into the church, greatly disturbing the congregation.

The plaintiff further offered evidence to show that, in order to reach its said works with its locomotives, the defendant constructed,

maintained and used a lateral track which leaves Virginia Avenue, along which avenue alone the Act of Congress granting it the right of way into the District of Columbia authorized it to construct its tracks, and enters upon and crosses a part of D street, passing over the side-walk of said D street into defendant's said works at a distance of about one hundred feet from the door of the church; that its locomotives were daily permitted to stand at the entrance of said works with their cow-catchers protruding several feet beyond the enclosure, and that they sometimes stood entirely across the side-walk of said D street, along which two-thirds of plaintiff's congregation were compelled to pass in going to and from the church, obstructing and rendering dangerous access thereto; that on several occasions members of the church and congregation narrowly escaped being run over by the sudden starting of said locomotives, without note or warning, and that the congregation had been thereby diminished, and attendance upon the Sunday-school, also, largely decreased.

The plaintiff further offered evidence to show the cost and value of its property, and the depreciating effect of the defendant's said works upon its annual value; and also introduced a map of the locality, showing the location of the defendant's works, its tracks, the church edifice, and adjacent buildings, which will be found at p. 9 of the printed record.

The defendant offered evidence tending to show that the value of property in the vicinity of its works was not depreciated by them, and that locomotives were not allowed to obstruct the side-walk, *so far as its witnesses knew;* but, in other respects, did not attempt to controvert either the fact, or the extent, of the damage inflicted, as shown by the plaintiff's evidence. Its evidence was substantially confined to showing that it was empowered, by its original charter, in the State of Maryland, to "make and construct all works what-"ever which may be necessary and expedient in order to the proper "completion and maintenance of the said road," without any expressed restriction as to the site to be selected for such works, and that the Act of Congress of Feb. 5, 1867, conferred upon it the same powers, rights and privileges in the District of Columbia as were given it, by its charter, in the State of Maryland, with some exceptions which are, perhaps, not material here; that the works complained of are well constructed, and adapted to the work intended to be done therein; that its employees are skillful, well-behaved and careful men, and that its smoke-stacks were higher than were required by the building

regulations in force in the City of Washington, for chimneys on buildings of their character.

Points and Authorities.

Three prayers for instruction to the jury were offered on behalf of the plaintiff below, each of which, with extensive supplemental instructions, was granted by the court. To each of these prayers, *with, and including*, all the superadded instructions given by the court, the defendant interposed one general, undiscriminating exception.

For example, to the plaintiff's first prayer, the court added instructions of its own motion, embracing the following, among other, distinct propositions:

1. That no man may be molested by his neighbor in the comfortable enjoyment of his own house.

2. That no grant of authority to a corporation to build shops can be construed as authorizing it to construct a nuisance.

3. That, though the defendant's shops were so necessary that it must have them, yet, if a nuisance in that neighborhood, it should find some other place to put them.

4. That no legislature has a right to establish a private nuisance.

5. That, had Congress undertaken to confer upon the defendant the right to take private property without paying for it, such grant would have been unconstitutional.

To the granting of the prayer *and* these superadded instructions, one general exception was taken.

To plaintiff's second prayer, the court, in like manner, superadded the following instructions:

1. That the plaintiff congregation were entitled to recover damages for the inconvenience and discomfort suffered in consequence of the acts of the defendant.

2. That the plaintiff's right to recover damages did not depend upon the question whether its real estate had been depreciated in value by the defendant's works.

3. That the congregation had the same right to the comfortable enjoyment of its church that a private gentleman has to the comfortable enjoyment of his own house.

4. That the discomfort is the primary consideration in allowing damages in such cases.

To all of which, the prayer and the additional instructions together, one general exception was noted. And so as to the plaintiff's

third prayer, and the instructions given by the court in connection therewith.

No rule, perhaps, has been more repeatedly declared by this court, than that it cannot, and will not, consider exceptions of this general character to the rulings of the *nisi prius* judge. (Carver vs. Jackson, 4 Pet., 80; *Ex Parte* Crane, 5 Pet., 190; Magniac vs. Thompson, 7 Pet., 390; Stimpson vs. West Chester R. R. Co., 4 How., 401; Lincoln vs. Claflin, 7 Wall., 139; 1st Unitarian Society vs. Faulkner, 1 Otto, 423.)

The rules of this court declare that "*the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts.*"

In Lincoln vs. Claflin, *supra*, this court says: "It is possible that the court erred in its charge upon the subject of damages. * * * But the error, if it be one, can not be taken advantage of by the defendants, for they took no exception to the charge *on that ground.* The charge is inserted at length in the bill, contrary to the proper practice, as repeatedly stated in our decisions, and contrary to an express rule of this court. *It embraces several distinct propositions, and a general exception in such case can not avail the party if any one of them is correct.*"

"If, indeed, in the summing up, the court should mistake the law, that would justly furnish a ground for an exception. But the exception should be strictly confined to that mis-statement, and, by being made known at the moment, would often enable the court to correct an erroneous expression, or to explain or qualify it in such a manner as to make it wholly unexceptionable, or perfectly distinct." (Carver vs. Jackson, *supra.*)

The defendant in error claims the benefit of this just and equitable rule, in this case. Its operation will exclude the necessity of considering the exceptions to the granting of the prayers offered on behalf of the plaintiff below and the accompanying charge of the court, as also the exceptions to the instructions given by the court in lieu of the prayers offered on behalf of the defendant below.

If, however, the entire charge of the court, as set out at large in the bill of exceptions, should be considered, then the record in this case presents three questions for the determination of this court, viz.:

I. Is a railroad company under an incorporating act providing in general terms that said company shall be invested with power to "make and construct all works whatever which may be necessary and expedient in order to the proper completion and maintenance of the

said road," exonerated from liability for the erection and maintenance of workshops, upon its own private property, in a locality where such workshops, if erected and maintained by a natural person, would be a private nuisance?

II. Is the discomfort and inconvenience of the plaintiff an element to be considered by the jury in estimating damages in an action for nuisance, where said plaintiff is a religious society or congregation, incorporated under the General Act of Incorporation in force in the District of Columbia?

III. Is the obstruction by said company of a street, or part of a street, not included in its right of way, by constructing and operating a railroad across it, without authority of law, thereby rendering difficult and dangerous access to the immediately contiguous property, depreciating its value, and rendering it unsuitable and unfit for the ordinary and reasonable uses to which it was devoted, "special damage" for which the plaintiff is entitled to be compensated?

Each of the defendant's numerous exceptions will be found upon examination to range itself under, or be covered by, one or another of the three propositions above.

I.

That works of the character of defendant's, as shown by the record, would constitute an actionable nuisance if erected or maintained by a natural person, is not seriously questioned in the case at bar.

Aldred's case, 9 Coke, 58.
Crump vs. Lambert, L. R., 3 Eq., 405.
Fish vs. Dodge, 4 Denio, 316.
Whitney vs. Bartholomew, 21 Conn., 212.
Hole vs. Barlow, 4 C. B., 334.

Defendant's position, however, as indicated by its exceptions to the ruling of the court below, is as follows: A corporation, granted under its charter the privilege of erecting and maintaining workshops, is exonerated from liability for their erection and maintenance in localities where, if erected and maintained by a natural person, they would constitute a private nuisance.

This position of defendant's embraces two propositions, viz.:

a. That the legislature *can* authorize a private nuisance.

b. That it *has* done so in the case at bar.

a. The court below denied the first of these propositions, and is sustained by numerous authorities.

"Neither the government of a city, nor of the State, can license a

private nuisance, or take or encroach on private property without the owner's consent, or the payment to him of adequate damages."

Lexington and Ohio R. R. Co., vs. Applegate, 8 Dana, 301.

"No ordinance can lawfully authorize the creation of a private nuisance, or justify him who creates one."

Masterson vs. Short, 7 Robertson, 299.

To an action for excavating banks of a stream, and thereby overflowing plaintiff's land, defendant pleaded its corporate rights, and that all reasonable prudence and caution had been exercised. *Held*, "The rule of liability of private corporations is precisely the same as that of individuals. (9 Wheat., 904; 12 id., 40; 4 id., 688; 4 Hammond, 500, 514; 3 Hill, 429.) * * * This act of the legislature merely gave authority to the defendants to cross this creek. It did not, and could not, give any authority to them to invade any private right without just compensation. * * * It did and could confer no exemption for wrongs to the rights of private property."

Robinson vs. N. Y. and Erie R. R. Co., 27 Barb., 513.

And see to same effect:

Fletcher vs. Auburn and Syracuse R. R. Co., 25 Wend., 462.

There is no case, in either the text books or the reports, where a *private* nuisance has been held "legalized."

The cases of so-called "legalized nuisances" are, without an exception, cases of interference, under legislative sanction, with public highways or water-courses; and, in these cases, the courts have almost uniformly held that the immunity was from indictment for the public inconvenience, and not from liability for invasion and injury to private property.

Fletcher vs. Auburn and Syracuse R. R. Co., 25 Wend., 462.

Stoughton vs. the State, 5 Wisc., 291.

Crittenden vs. Wilson, 5 Cow., 165.

Robinson vs. N. Y. and Erie R. R. Co., 27 Barb., 513.

Tinsman vs. Belvidere Delaware R. R. Co., 2 Dutcher, 149.

Ten Eyck vs. Delaware and Raritan Canal Co., 3 Harr., 201.

Sinnickson vs. Johnson, 2 Harr., 129.

Eastman vs. Amoskeag Co., 44 N. H., 143.

Lee vs. Pembroke Co., 57 Me., 481.

Seneca Road Co. vs. Auburn & Rochester R. R. Co., 5 Hill, 170.

Turnpike Co. vs. Camden and Amboy R. R., 2 Harr., N. J., 314.

Hooker vs. New Haven and Northampton Co., 14 Conn., 152; 15 Conn., 312.

To the foregoing authorities, may be added Pumpelly vs. Green Bay Co., 13 Wall., 166. The action was for overflowing plaintiff's premises, choking up his drains, filling up his ditches, leaving deposits of sand on his land, and the like, by means of the defendant's dam across Fox River. Defendant's plea, as summarized in the opinion of this court, "presents substantially the defence that the State of Wisconsin, having in the progress of its system of improving of the navigation of the Fox River, authorized the erection of the dam as it now stands, without any provision for compensating the plaintiff for the injury which it does him, the defendant asserts the right, under legislative authority, to build and continue the dam without legal responsibility for those injuries. And counsel for the defendant, with becoming candor, argue that the damages of which the plaintiff complains are such as the State had a right to inflict in improving the navigation of Fox River, without making any compensation for them." *Held*, bad. "There are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be * * * equivalent to the taking of it, and that under the constitutional provision it is not necessary that the land should be absolutely taken. * * * * We are of opinion that * * * * where real estate is actually invaded by superinduced additions of water, earth, sand, *or other material*, or by having any artificial structure placed on it, *so as to effectually destroy or impair its usefulness*, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. * * * We are, therefore, of opinion that the second plea set up no valid defence, and that the demurrer to it should have been sustained."

In this case of Pumpelly vs. Green Bay Co., the invasion of the plaintiff's property, which this court held the legislature could not "legalize," was with water, deposits of sand, and the like. In the case at bar, the invasion is with smoke, noises, cinders, dust and offensive odors. There is no difference between them either in principle, or in practical effect. It was the "serious interruption to the common and necessary use of property," and not the *means* of such interruption, which the court held to be "equivalent to the taking of it," within the constitutional provision. That there has been, in this case, an interruption of this character, so serious, in fact, as to destroy the value of the plaintiff's property for every ordinary purpose, is not questioned, or questionable, upon the record.

These decisions, and especially the last, would seem to set at rest the question whether the legislature can authorize a private nuisance, or "legalize" that which will "effectually destroy or impair" the usefulness of private property. If the plaintiff in error might take from this church the use and enjoyment of its property to the extent of $1,500 per annum without compensation, why could it not deprive the church entirely of such use and enjoyment? It would be mockery to forbid that *property* should be taken without compensation, but allow its *value* to be so taken. Property is only "the right to the use and enjoyment of things;" whatever takes away such use and enjoyment, takes away *property*.

(*b.*) But, in the second place, it is of no consequence whether the legislature can or can not authorize the creation of a private nuisance, if this court shall find, with the court below, that in the case at bar it has not in fact done so.

The act of Congress approved February 5, 1867, (14 Stat., 387) relied on by the defendant as legalizing the acts complained of, merely gives the defendant the same rights and powers in the District of Columbia as its charter (May 6, 1853,) gave it in the State of Maryland. But these rights and powers (see Record, p. 11,) were only, *pro hac vice*, the power to "make and construct all works whatever which may be necessary and expedient in order to the proper completion and maintenance of the said road." And the only question before the court upon this branch of the case is: Does this general authority to construct the necessary works of the defendant company authorize the construction by said company, upon its own private premises, of works which are, in the locality selected by it for their erection, injurious and destructive to adjoining private property?

There is nothing in the language of the act to support the defendant's claim. So far as the works here complained of are concerned, it merely confers upon the corporation a privilege which every natural person possesses without a charter; and there is no indication in the act that the Legislature intended to free the corporation from the restriction which the law places upon the exercise of that privilege by natural persons, viz.: *Sic utere tuo ut alienum non laedas.*

Nor is the defendant's construction of its charter countenanced by the authorities.

In Babcock vs. The New Jersey Stock Yard Company, which was an application for an injunction against exercising an offensive trade

by the defendant, an incorporated company, the Court said: "I have no hesitation in holding, and it was not disputed by counsel for the defendants, that this charter does not empower the defendants to carry on the business authorized in a way that would be injurious to others, or would materially affect their health, their comfort, or their property." Injunction granted.

20 N. J. Eq., 296.

Commonwealth vs. Kidder, 107 Mass., 108, was an indictment for causing smoke, offensive smells, &c., in refining petroleum. Defendant pleaded statute of 1866, providing that petroleum might be kept, refined, &c., in specified classes of buildings, with specified precautions and appliances, &c., and proved full compliance with all the requirements of the statute. *Held*, that the enactments contemplated dangers to the public from the explosive and inflammable nature of petroleum, and protected from indictment in that particular; but left the question of nuisance in respect to *place and offensiveness to the public*, to be determined by the rules of common law.

Salem vs. Eastern R. R. Co. was an action growing out of a pond of stagnant water created by defendant's embankment. Defense, act of the Legislature, passed *after* construction of the embankment, providing as follows: "The location of the Eastern R. R. Co., and said R. R. and its branches, *as the same are actually laid out and constructed*, in the counties of E., M., and S., are hereby ratified and confirmed." The Court said: "It cannot be supposed that the Legislature intended to exempt the corporation from responsibility for unnecessary and unreasonable encroachments upon either private or public rights by its mode of constructing the road or its embankments. Such operation can be given to legislative grants of authority *only when it results necessarily from the application of the grant to the object which is attained thereby.*"

Does the erection of the engine house and repair shops of a railroad company near the center of a populous city, wedged in between two large churches, and immediately fronting a large public school, attended by from twelve to fifteen hundred children, "result necessarily" from a grant of authority to construct all works "necessary and expedient in order to the proper completion and maintenance of the said road?"

Luning vs. The State, 2 Pinney (Wis.,) 215, was an indictment for nuisance growing out of the erection of a dam. Defense, act of the Legislature authorizing construction of dams across unnavigable

streams. The Court said: "Though that act has been decided in this court to be valid, yet it cannot be conceived that by erecting a dam in accordance with its provisions, license is thereby given to create and continue a nuisance."

In Crittenden vs. Wilbur, (5 Cow., 165,) defendant pleaded legislative authority to construct the dam upon his own land, and that he had complied with all the requirements of the act. *Held*, no bar to the action, which was for damages to adjoining private property.

Brown vs. Cayuga and Susquehanna Railroad Company, (12 N. Y., 491,) was for flowing plaintiff's land by means of a cut. Plea, that defendant was authorized by its charter to cross highways and streams, and that the cut in question was necessary to the construction and maintenance of the road. The court said the question was, whether the act relieved defendant of the responsibility of a natural person under the same circumstances—"one of construction, whether the language of the Legislature purports to exempt these corporations from that measure of responsibility which would attach to the owner of the stream, and of the land upon both sides of it, who chose upon his own land to build a bridge across, or a dam upon it. I think it does not require, and should not receive such a construction. * * * It would be a great stretch upon the language, and an unwarrantable imputation upon the wisdom and justice of the Legislature, to hold that it imports an authority to cross the streams in such a manner as to be the cause of injury to others owning adjoining property." *Held*, that the company were under the same obligation as a private owner of the land and stream, had he bridged it.

Tinsman vs. Belvidere and Delaware Railroad Company, (2 Dutcher, 149,) was for diversion of the water of a creek from its ordinary channel. Defendant pleaded charter right to build as it had, and that its road was constructed in the most prudent, judicious and skillful manner. Court held, on demurrer, that it is not to be *presumed* that the Legislature, in conferring authority to construct, &c., designed to exempt the defendant from liability for injuries resulting from their acts; the common law liability for such acts remains.

To the same effect as foregoing cases see: Ten Eyck vs. Raritan Co., 3 Harr., 201; Sinnickson vs. Johnson, 2 Harr., 129; Eastman vs. Amoskeag Co., 44 N. H., 143; Inhabitants of Springfield vs. Connecticut River R. R. Co., 4 Cush., 63; Lee vs. Pembroke Co., 57 Me., 481; Hooker vs. New Haven and Northampton Co., 14 Conn., 152, and same case in 15 Conn., 312.

The case last cited was for temporarily flowing plaintiff's land. Defendant pleaded its charter, and that the act from which the flowing resulted was "the obvious, natural and unavoidable consequence of the proper use of said canal and waste wier." The Court said: "It is not claimed that any express authority is given to the company to protect their works at the expense of injury of others; but we are called upon to say that it is implied, upon the principle that an authority to do an act, necessarily implies that the grantee may use the means necessary to accomplish it. Had the legislature expressly given such a right to this corporation, without providing any compensation to the party injured, it would have demanded our serious consideration whether such an act was constitutional. But we are now required to say, not only that such a grant would be constitutional, but also to infer that such an authority was intended to be granted from the mere fact that a canal is authorized. * * * We do not think we are bound to give such a construction to a legislative grant as would subject the legislature to the imputation of great injustice, if not a violation of constitutional rights, where such an intent is not clearly expressed. * * * The maxim, *sic utere tuo ut alienum non laedas*, is as applicable to one claiming under a legislative grant as to one claiming under a private grant (5 Cowen, 156); to public corporations as to private citizens."

"Corporations, as well as individuals, by the principles of the common law, are bound so to exercise their rights as not to injure others. The principle, *sic utere tuo ut alienum non laedas*, is of universal application."

Lowell vs. Boston & Lowell R. R. Co., 23 Pick., 30.

Where authority was given to defendants to erect workshops to manufacture machinery, apparatus, &c., *held*, that this would not justify the erection of a shop for hardening rails in a locality where the noise would be a nuisance.

Cooper vs. The North British R. R. Co., 35 Jurist, 295; reported also in Sessions Cases, 3d series, vol. 1, p. 499.

In Bamford vs. Turnley, 31 L. J., (N. S., Q. B.), 286, the Exchequer Chamber held that it was no answer in an action for a nuisance creating actual annoyance and discomfort in the enjoyment of neighboring property, that the injury resulted from a reasonable use of the property, and that the act was done in a convenient place.

"Any business, however lawful, which causes annoyances that materially interfere with the ordinary comfort, physically, of human

existence, is a nuisance that should be restrained; and smoke, noise, and bad odors, even when not injurious to health, may render a dwelling so uncomfortable as to drive from it any one not compelled by poverty to remain. * * * Any interference with our neighbor in the comfortable enjoyment of life, is a wrong which the law will redress." (Cleveland *et al.*, vs. The Citizens' Gas Light Co., 20 N. J. Eq., 201. Also, Attorney General *et al.*, vs. Steward *et al.*, 20 N. J., Eq., 415.)

"I do not think that, because the legislature intended to confer upon the company all the powers necessary for them to carry out the object for which they were incorporated, they are therefore necessary clothed with all powers to meet that necessity, and that where not *expressed*, such powers are to be derived from implication. In a limited sense, the proposition is true. *It is true, as a general proposition, when the power sought to be implied does not take away or impair the legal rights of individuals or of any other corporation.*" (Morris & Essex R. R. Co., vs. City of Newark, 10 N. J., Eq., 352.)

In Hay vs. The Cohoes Company, 2 N. Y., 159, the defendant, a corporation, dug a canal upon their own land for the purposes authorized by their charter. In so doing, it was necessary to blast rocks with gunpowder, and the fragments were thrown against and injured the plaintiff's dwelling, upon lands adjoining. *Held*, That the defendants were liable for the injury, although no negligence or want of skill in executing the work was alleged or proved.

To same effect is Tremain vs. The Cohoes Co., 2 N. Y., 163.

It is to be observed that there is nothing in the company's charter which *expresses* any intention to exempt it from the operation of the maxim *Sic utere tuo ut alienum non laedas*, in exercising its right to locate and maintain its works. Such exemption must be created by *implication*, if at all.

In Auburn and Cato Plank Road Co., vs. Douglass, 9 N. Y., 444, the Court of Appeals declare the question to be, "Whether acts of the legislative power, conferring special privileges and parceling out the sovereign rights of the people, are to be construed strictly according to their terms, or liberally with a view to make the grant as beneficial as possible to the grantee; whether corporations are to be content with what is expressly conceded to them by their charters, or are to encroach beyond the terms of those charters upon the legislative power, and upon the rights of individuals, and to take by implication whatever may be necessary or convenient for the exercise, or essential

to the value of their corporate rights." *Held*, as established law, that the corporation "is strictly confined to the privileges conferred by its charter, and can take no implied rights as against the law-making power," and that, "*a fortiori*, it should not be permitted to encroach by implication upon the rights of individuals who are in no respect parties to the compact between the legislature and the corporation."

"Corporate powers can never be created by implication, nor extended by construction. No privilege is granted unless expressed in plain and unequivocal words, testifying the intention of the legislature in a manner too plain to be misunderstood. * * * In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the resolution." (Penn. R. R. Co., vs. Commissioners, 21 Pa. St., p. 22.) See, also:

Wood on Nuisances, chapter on "Legalized Nuisances."
Black vs. Canal Co., 24 N. J., Eq., 455.
People vs. Lambier, 5 Denio, 9.
Stormfeltz vs. Manor Co., 13 Pa. St., 555.
R. R. Co., vs. Thomas, 101 U. S., 71.
Inhabitants of Springfield vs. R. R. Co., 4 Cush., 63.
Ottawa Gas Co., vs. Graham, 28 Ill., 73.
Story vs. Elevated R. R. Co., Albany Law Jour., Nov. 4, 1882.
Bank of Pa., vs. The Commonwealth, 19 Pa. St., 152.

In the last named case, the court say: "If acts of incorporation are to be so construed as to make them imply grants of privileges, immunities and exemptions which are not expressly given, any company of adventurers may carry what they wish without letting the Legislature know their designs. Charters would be framed in doubtful or ambiguous language, on purpose to deceive those who grant them; and laws which seem perfectly harmless on their face, and which plain men would suppose to mean no more than what they say, might be converted into engines of infinite mischief. * * * * There is no safety to the public interests except in the rule which declares that the privileges not expressly granted in a charter are withheld."

Can it be supposed that either Congress, or the Legislature of Maryland, could have been induced knowingly to confer upon this company, either expressly or by implication, the right to locate its engine-house and machine-shops in any part of Washington or Baltimore, as its own convenience might dictate, and pour its smoke, dust, cinders and offensive odors into any adjoining private dwelling-

house, business property, or church, without that liability to compensate for the damage thus inflicted which is imposed upon all natural persons?

In Fertilizing Co., vs. Hyde Park, 97 U. S., 659, complainant was authorized by its charter to have depots in the city of Chicago for offal, and to establish it chemical works in Cook county, Illinois, "at any point south of the dividing line between townships 37 and 38." It located its works within the limits prescribed, and in a locality then "swampy and nearly uninhabited." The bill was filed to enjoin the authorities of the village of Hyde Park, which subsequently sprang up in the locality, from interfering with the continuance of its business, under the village charter giving authority to abate nuisances, on the ground that the company's charter was a contract with the State, authorizing it to conduct its business wherever it might select, within the prescribed limits. The court said: "The company has not the choice of location within the city. So, in regard to the chemical works. The company, by its contract, is entitled to have them in Cook county south of the line mentioned; but the precise locality within that large space is a fair subject of regulation by the police power of the State, or of any town to which it has been delegated." And Mr. Justice Strong, though dissenting from the decision of the court, said: "I concede that the company could not exercise their discretion wantonly, *or in negligent disregard of others.*"

In the case at bar, the plaintiff in error denies that it is under any duty to regard the rights of others, in choosing the site for its engine-house and machine-shops. If the site chosen *suits its convenience*, no one has any right to complain.

Some effort is made to justify the location of the works of the plaintiff in error, at page 11 of the printed record, by showing that *one side* of the square is occupied, principally, by the houses of colored people. It is conceived that if this were true of all four of the sides, it would not constitute a justification for establishing a nuisance there. The maxim, *Sic utere tuo ut alienum non laedas*, protects the homes of the poor as well as of the rich. The record shows, however, that the works in question are located between two large churches, immediately in front of a large public school, and in a business portion of the city; one entire side of the square, and part of another, being taken up with business houses.

"The fact that a neighborhood to be affected by the odors and offensive smell that will be caused by a business which the defendant

is about to establish, and which complainant seeks to enjoin as a nuisance, already contains establishments devoted to noxious or disagreeable trades, is not enough to defeat the right to an injunction, unless such neighborhood has been by their continuance for years so wholly given up to such establishments that the addition of the one contemplated by the defendant will not add sensibly to the discomfort." (Cleveland vs. Gas Light Co., 20 N. J., Eq., 201.)

Lastly, upon this first question, viz.: whether the charter of the plaintiff in error exempts it from liability for consequential damages to private property occasioned by it in the prosecution of its corporate ends, it is to be observed that the Act of Congress granting it the right to enter the District of Columbia conferred upon it only the *same* powers, rights and privileges in the District as are given it by its charter in the State of Maryland. It follows, therefore, that the privilege or exemption here claimed does not exist, unless that privilege or exemption is conferred, also, in the State of Maryland, by its charter. The negative of this proposition would seem to be conclusively established by the case of *The Baltimore & Potomac R. R. Co., vs. Reaney*, 42 *Md.*, 117.

This case grew out of the tunneling of Wilson street, in the City of Baltimore, by the plaintiff in error here, thereby causing the settling and cracking of the walls of Reaney's house, which was situated on Madison Avenue, contiguous to Wilson street. The defence was, as in this case, that the company had authority, both from the city and the legislature of the State, to tunnel the street, and that there was no negligence or want of care in doing the work. The court said: "We are of opinion that the appellants had ample authority to tunnel the streets, derived both from the city and State legislature. * * * Having authority to construct the tunnel, they contend that any damage that the appellee may have suffered to his house, by reason of the excavation of the street, is *damnum absque injuria*, and that no right of recovery exists unless it be shown that the power delegated to the appellants has been illegally or negligently exercised. *To this, however, we do not assent.* * * The jury have found that the property of the appellee has been damaged to the extent of three thousand dollars, and it would be a *reproach to the law* if the courts were required to determine that * * there was no redress for such a wrong. There is no reason why the appellee should be required to bear such a loss; it not being for any municipal benefit, but for the benefit of a private railroad corporation, with which he is no more

concerned than any other individual of the State. * * * * That there was no negligence or want of care in doing the work, is no answer in a case like this. If the injury was the inevitable result of making the tunnel, then, to the extent that the appellee's property was actually injured, it was substantially taken for the use of the appellant's road, and, of course, should be paid for. *It is not to be assumed that either the city authorities, or the Legislature of the State, intended that the authority delegated by them should be exercised* IRRESPECTIVE OF THE RIGHTS OF PRIVATE PROPETY; *and if it were clear that they did so intend, it is far from being certain that such a purpose could be accomplished.* (Gardner vs. Village of Newburgh, 2 John. Ch. Rep. 162; Eaton vs. Boston, Concord & Montreal Rail. Co., 51 N. H., 504; Pumpelly vs. Green Bay Co., 13 Wall., 166. *That the excavation of the street for the tunnel was lawful, and done in a lawful manner at the time, can constitute no defence to this action, if damages actually resulted from the work.*"

We submit, therefore, that the defendant's first, fourth, fifth and tenth exceptions to the rulings of the presiding justice are not well taken.

Supposed Adverse Authorities.

Black vs. Philadelphia & Reading R. R. Co., 58 Pa. St., 249, relied upon by the other side, was a bill by owners of property fronting on *a public street*, to enjoin the laying of a track upon that street, on the ground of prospective injury to their property. The company had express authority to lay its tracks across the street in question, and, in addition, it was found, as a matter of fact, that there was no special injury to the plaintiffs; and, upon these facts, the bill was, of course, dismissed.

Cleveland & Pittsburg R. R. Co., vs. Speer, 56 Pa. St., 325, was an action for nuisance to plaintiff's dwelling-house from defendant's switches, *located in a public street*, in front of his house, producing noises, offensive smells from cattle, smoke, &c. *Held*, that the defendant's charter, giving it power to enter Pittsburg, and not restricting the route of entry, left the selection of its route to the defendant, and authorized the laying of its tracks, including the switches, upon the street in question. That case is, evidently, essentially different from the case at bar. Here the route is *prescribed;* the defendant has left the designated street, and built, not a switch, but a branch road across a street not included in its grant, and not for the purpose of entering

Washington, or for any other public end, but merely to reach property of its own which it has seen fit to use as the site of its engine-house and machine-shops. It is further to be observed that this case is in direct conflict with the decision of this court in Pumpelly vs. Green Bay Co., 13 Wall., 166, and the weight of authority; holding, in terms, that "an action at common law will not lie for a private injury by the execution of legal powers exercised judiciously and carefully."

Turnpike Co., vs. Camden & Amboy R. R., 2 Harr.. N. J., 314, was an action for damages for the disturbance of the plaintiff in the enjoyment of its franchise, by the construction of the defendant's road, and the use of its locomotives near the plaintiff's road, making it dangerous for travellers to pass and re-pass the plaintiff's road, and depriving it of its tolls. *Held*, that the use of steam-engines upon or near a public highway, if authorized by legislative charter, can never be a *public* nuisance; that the use of steam on railroads, though warranted by law, may nevertheless work a private injury, and thereby become a private nuisance, *for which the party injured has his remedy by action;* but that, in that case, the injury was too remote, resulting, if at all, merely from the fears, prejudices, passions or caprices of the public, if not, indeed, from the easier and more expeditious mode of conveyance offered by the defendant.

In Ford vs. Chicago and Northwestern R. R. Co., 14 Wisc., 663, the location *of the line of defendant's road* was left to its discretion, and the court held that it could not interfere with its appropriation of a public street for that purpose; but it laid down the proposition, and supported it by a review of the authorities, that adjoining property-holders were entitled to compensation for the injury to their property.

N. Y. & H. R. Co., vs. Hip, 46 N. Y., 546, was a proceeding to condemn defendant's land as a site for a depot and warehouses, resisted on the ground that other property in the vicinity, equally convenient and accessible, could be had. The court held that the company enjoyed a delegated right of eminent domain, and that the courts could not direct which of several plats of ground should be taken under it. The proceeding embraced an appraisal of damages, and there is nothing whatever in the case to sustain the power of a corporation to injure or destroy private property, in the pursuit, and on the plea, of its own convenience and profit, without the corresponding duty of compensation to the owner.

Giesy vs. R. R. Co., 4 Ohio St., 308, Brainard vs. Clapp, 10 Cush., 6, and Hawley vs. Steele, 6 Ch. Div., 521, are in the same line as the preceding case, but have even less bearing upon the case at bar.

Porter vs. North Mo. R. R. Co., 33 Mo., 128, was for the authorized construction of the defendant's road along the public street on which the plaintiff's house abutted.

Navigation Co., vs. Coons, 6 Watts & S., 101, was for backing water, to the injury of plaintiff's mill, by constructing, under legislative authority, a dam in a public river. The decision is directly in conflict with that of this court in Pumpelly vs. Green Bay Company.

Henry vs. Bridge Co., 8 W. & S., was for changing the grade of a public street, to the injury of plaintiff's property, under legislative authority and municipal direction.

Hatch vs. Vt. Central R. R. Co., 25 Vt., 49, was an action for consequential damage to plaintiff's premises from the raised road-bed of the defendant, in the public highway, along which highway the defendant had the right to construct its road.

N. Y. & Erie R. R. Co., vs. Young, 33 Pa. St., 175, was for consequential injury resulting from the location selected for the company's road, along the bank of the Susquehanna river, the Legislature having authorized it to extend its road through such portion of the county in question as it might deem necessary.

Renwick vs. Morris, 3 Hill, 621, simply holds that where one, authorized to build a dam upon navigable waters, builds it so as to impede navigation *beyond* what the act authorized it becomes, *pro tanto*, a pulic nuisance. Applicable to track of the plaintiff in error across D street.

Bridge Co., vs. Kirk, 46 Pa. St., 112, was an action for injury to a coal-boat, occasioned by a pier constructed in a navigable river under legislative authority, which gave the company no discretion as to the location of its bridge.

Radcliffe's Executors vs. Mayor of Brooklyn, 4 N. Y., 195, was an action against a municipal corporation for lowering the grade of one of its streets, in consequence of which a portion of plaintiff's land fell in. The case was decided, expressly, upon the same rule of liability as prevails where the plaintiff and defendant are natural persons.

Bellinger vs. N. Y. Central R. R., 23 N. Y., 42, was for flowing plaintiff's land by means of a bridge over a water-course. The decision is in direct conflict with that of this court in Pumpelly vs.

Green. But it is not adverse to the defendant in error here; for the court say that if the defendant interfered with the stream *without legislative authority*, as the plaintiff in error has in this case crossed D street, he would be responsible absolutely, and without regard to actual negligence.

Moyes vs. R. R. Co., 88 N. Y., 351, was for flowing plaintiff's land "by the necessary and proper elevation of its road-bed" upon its own land, where it was authorized by law to construct its road.

No one of these cases, it will be observed, is at all analogous to the case at bar. All of them relate to interference, under legislative authority, with navigable water-courses or public streets. Several of them are in direct conflict with the decision of this court in Pumpelly vs. Green Bay Co., and with the decided preponderance of authority; but *no one* of them sustains the proposition that a corporation may maintain, upon its own private property, works which would be a nuisance if maintained by a natural person, or that a railroad company may construct and operate a track across a public street, not included in its prescribed route or right of way in a city, in order to reach such works.

Transportation Co., vs. Chicago, 99 U. S., 635, was an action against the city of Chicago for temporary obstruction of a public street, unavoidably occasioned, in the extension of the street by means of a tunnel under the Chicago river. *Held*, that neither the State, nor its duly authorized agents, are answerable for consequential damages in making or improving a public highway, if they act within their jurisdiction, and exercise due care and skill. This case was considered by the learned justice who presided at the trial below, and the distinction between it and the case at bar clearly pointed out, at page 21 of the printed record. There is neither analogy nor conflict between them.

II.

The second of the three questions presented by the exceptions relates to the measure of damages.

The court below instructed the jury, in effect, that the plaintiff, a duly incorporated congregation, was entitled to damages for the inconvenience and discomfort suffered in the enjoyment of its property, in consequence of the defendant's works, if they found those works to be a nuisance.

If competent exceptions as to the rule of damages laid down by the court had been taken by the plaintiff in error, this court would

not determine their correctness, in point of law, from isolated sentences of the charge. "The whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts of the charge. In short, we are to construe the whole as it must have been understood, both by the court and jury, at the time when it was delivered." (Magniac vs. Thompson, 7 Pet., 390.)

The following collocation, taken in connection with the second prayer offered on behalf of the defendant in error, at page 15 of the printed record, presents all that was said to the jury by the presiding justice upon this subject as to the measure of damages:

"Every man has a right to the comfortable enjoyment of his own house, in which enjoyment a neighbor cannot molest him. * * * The suit is brought by a congregation duly incorporated, and they have brought an action to recover damages for their inconvenience and discomfort in consequence of the acts of the defendant. It is the personal discomfort more than anything else which is to be considered in regard to the assessment of damages. Now, I can very easily imagine, and it may often happen, that the construction of an improvement such as this might increase the value of property in the vicinity, and I am not sure at all that the erection of this workshop in that neighborhood may not really have increased the intrinsic value of the property belonging to this congregation. The evidence in the case does not, as it seems to me, show that this property has been depreciated by the construction of that workshop. We can imagine, and it is not a far-fetched imagination either, that the effect of such a workshop in that neighborhood might be to collect a population around it, and thus increase the population in that neighborhood, and really enhance the value of property; and yet the congregation would be entitled to recover damages (although their property might have increased in value) because of the inconvenience and discomfort they have suffered from the use of the shop. The congregation has the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house; and it is the discomfort which is the primary consideration in allowing damages."

Thereupon the plaintiff in error offered its third prayer, to the effect that the proper measure of damages was, interest for three years

upon such sum as would represent the extent to which the plaintiff's property was wrongfully depreciated in value, and the court said: "That, I think, gentlemen, is not the measure of damages at all. The proper measure of damages is such damages as you may think this congregation entitled to for the discomfort which they have been put to in the use of that property. It is not a very definite rule, but it is as definite as we can make it. Possibly, as I said before, the rule might work the other way, and, if this were the measure of damages, then if the construction of the workshop and increase of population produced thereby in that neighborhood would have brought about an increase in the value of property, then the plaintiff would not have been entitled to any damages, although for three years they might have been subjected to all the discomfort which they claim to have proved. That shows that this rule can not be the right measure of damages, one way or the other." And, again, in reference to interest, re-presented as the measure of damages in the plaintiff in error's third prayer: "That is not the correct measure of damages, because the defendant would escape all damages if the property taken increased in value notwithstanding the nuisance. The proper rule of damages is what you may choose to allow this congregation for the discomfort and inconvenience which it has been put to by the manner in which that workshop has been used, for those three years, if you find it to have been a nuisance."

Finally, the learned justice concluded his charge to the jury as follows: "I think, gentlemen, that I have now said all that I ought to say, unless it be a word of caution in regard to damages. Sometimes juries are led off by their sympathies, under excitement, and give damages which make it necessary that a new trial shall be granted. A court cannot allow injustice to be done, even by a jury. It is within the power of the court to set aside a verdict for excessive damages, and it is better to avoid that. Still I do not want to limit you at all in the just exercise of your discretion. But you ought to consider that this congregation was actually in the possession and use of this property during this whole period.

"I do not understand that there is any allegation in the declaration of damage in consequence of members of the church being driven off to other places; nothing of that kind; and you ought not to consider that in making up your verdict. You ought to consider that the whole congregation is there to-day as it was when the time covered by the declaration began. * * * * You are only to consider

the actual damages which those who worship in that church suffered from this nuisance, if you find it to have been a nuisance, during that period."

This charge, construed "as a whole, as it must have been understood both by the court and jury, at the time when it was delivered," it is submitted, is entirely free from error.

Three objections, however, are made to it, viz.: First, That the declaration claims damages for the depreciation in value of real estate, only, and is not broad enough to let in inquiry as to discomfort and inconvenience suffered by the plaintiff congregation in its use and enjoyment.

Secondly, That the discomfort and inconvenience of the members of the congregation in the use of their church property must be sued for by them, individually, if at all, and cannot be redressed by suit in their collective, corporate capacity.

Thirdly, That interest for three years upon such sum as represents the pecuniary depreciation in value of the property was the only correct measure of damages.

(1.) It was the discomfort and inconvenience wrongfully annexed by the plaintiff in error to the use and enjoyment of the property, which depreciated or lessened its value to the defendant in error. The extent of that discomfort and inconvenience is, therefore, the necessary and natural measure of the damage suffered.

The use and enjoyment actually derived from his property, increased by such additional use and enjoyment as would have been derived therefrom but for the acts of the wrong-doer, or the equivalent thereof, is precisely what the owner is entitled to.

But the declaration itself is the shortest answer to this objection. The first count alleges that the defendant, by means of the wrongful acts complained of, did "*disturb, annoy and molest* the said religious society or congregation while engaged in worship as aforesaid, by means whereof the value of the said lot and premises of the plaintiff was and is greatly depreciated, and the said meeting-house was and is rendered unsuitable and comparatively valueless as a house of worship, *and incapable of being used in so advantageous and beneficial a manner as it otherwise might and would have been*," &c.

The second count avers that the defendant did the injuries complained of "*to the great inconvenience, hindrance, discomfort, interruption and annoyance of the said society or congregation and* to the great depreciation in value" of its church building, rendering it "unsuit-

able and unfit for the purpose for which the same was erected, and was and is used," &c.

The third count alleges that the defendant did the wrongful acts complained of, "*to the great disturbance, interruption, discomfiture, and annoyance of the said society or congregation,* and the said property of the plaintiff has been thereby greatly depreciated in value, *and the plaintiff has been thereby prevented from having so beneficial a use and occupation thereof as it otherwise might and would have had,*" &c.

(2.) The second objection is, that the discomfort and inconvenience suffered by the plaintiff congregation can not be redressed by a suit in its collective, corporate capacity, but must be sued for, if at all, by the members individually.

The religious society or congregation, the plaintiff in this cause, is a corporation of all the members of said society or congregation, and not of the trustees, or of a limited portion of the members.

Rev. Stats. D. C., § 553, *et seq.*

Gram vs. Prussian Evangelical Lutheran Society, 36 N. Y., 161.

Robertson vs. Bullions, 1 Kernan, 243.

Cooper vs. Trustees 1st Pres. Church, 32 Barb., 222.

The inconvenience and discomfort of the congregation was, therefore, the inconvenience and discomfort of the *corporators.*

The act of general incorporation, under which the plaintiff is incorporated, provides as follows:

"It shall be lawful for the members of any society or congregation in the District formed for the purpose of religious worship, to receive by gift, devise, or purchase a quantity of land, not exceeding an acre, and to erect thereon such houses and buildings, and to make such other use of the land and such other improvements thereon, as may be deemed necessary for the purposes named, *and for the comfort and convenience of the society or congregation.*"

The comfort and convenience of the plaintiff society or congregation in the use and enjoyment of their property are, therefore, *a part of their corporate rights.*

Unless, therefore, it was error to charge that a corporation is entitled to recover damages for unlawful deprivation of its corporate rights, the ruling of the court below was correct.

The court simply told the jury that the congregation had "the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of

his own house." The negative of this proposition can not be reconciled with either the language of the Incorporation Act, or the ordinary principles of justice, reason, or common sense.

It is objected, however, that the invasion of this right must be redressed, *if at all*, by the separate suits of the individual members of the congregation. But the authorities cited on the other side show conclusively that this can not be done. They further show that suits by, or on behalf of, the church itself, is the appropriate remedy.

Thus, Owen vs. Henman, *et al.*, 1 Serg. & W., 548, was a suit by a member of a congregation against the defendants for unlawfully disturbing him in hearing preaching, &c., in the church. *Held*, that "the property of our churches and meeting-houses, and the superintendence of congregations, and the right to control and regulate them, and to prevent improper intrusion or interference, by suit or otherwise, is uniformly vested in some corporation or trustees. * * * * It is for them, or the organized officers, to bring actions of trespass or on the case, to regulate the affairs of the church, and to protect the members in the enjoyment of their religious rights and property."

Sparhawk vs. R. R. Co., 54 Pa. St., 401, also relied upon on the other side, was a bill filed by an individual to enjoin the railroad company from running their cars over any of the streets of the city of Philadelphia on Sunday, on the ground of interference with plaintiff's public and private religious worship. *Held*, that the plaintiff could not maintain his bill.

So far from holding that the members of a church or congregation should sue individually, this case decides that they cannot do so. It will not, upon examination, be found in conflict in any particular with the instructions given by the court below in this case. (See, at pp. 425 *et seq.*) On the contrary, it expressly cites and approves Owen vs. Henman, cited above.

In Unangst vs. Shortz (5 Whart.), *Held*, that trespass for breaking into the church building was properly brought by the trustees, and the damages recovered, *after* repairing any damages *to the building*, were for the benefit of the society injured. Cited and approved in the parish of Bellport vs. Tooker, (29 Barb., 274,) and in Cooper vs. First Presbyterian Church, (32 Barb., 234.)

The First Baptist Church vs. Schenectady & Troy R. R. Co., (5 Barb., 88,) was a case similar to the case at bar. "The defendant's counsel contends that it was the individuals who assembled at the

plaintiff's house for worship, and not the corporation owning the house, who were annoyed by the defendant's noise, and that therefore these individuals, and not the corporation, should have been the plaintiffs in the action." *Held*, approving Owen vs. Henman, *supra*, that the action was properly brought by the church.

In the case at bar, it is the individuals worshiping at the church who constitute the corporation.

It is clear, upon the foregoing authorities, that the members can not sue individually. If the corporation can not sue either, it follows that no redress can be had for wrongful interference with, or destruction of, the comfortable and convenient use and enjoyment of church property. This can not be.

"The injury to the plaintiff often consists, in whole or in part, of the inconvenience and annoyance to which the plaintiff is subjected, the invasion of his privacy, and the interference with his comfort. For wrongs of this class, equally with pecuniary loss, he is entitled to equivalent damages."

Ives vs. Humphrey, 1 E. D. Smith, 196.

See, also, Park vs. C. & S. W. R. R. Co., 43 Iowa, 640.

It is objected that the measure of damages laid down by the court would have enabled the defendant in error to recover damages for the crushing of a foot, or an arm, of one of its members. No objection of that sort was made at the trial. There is nothing in the language of the charge which either the court or the jury could have understood in that way at the time. And no proof, or claim, of damages of such a character is disclosed in the record, or was offered in fact.

"It is beyond doubt that no such distinction was in the mind of the court, or was in fact uttered to the jury. The language of the charge has reference to the actual posture of the case before the court, and not to any other possible state of facts." (Magniac vs. Thompson, 7 Pet., 394.)

It is also objected that the court told the jury that the company's works were "permanent," and "not a mere temporary" inconvenience.

This objection, also, was not made at the trial.

What the court did tell the jury upon this point, however, was unobjectionable. It will be found at page 21 of the printed record, and amounts to no more than saying that if the company's obstruction of D street was temporary in its character, like that which results from collecting building materials in the street when a house is being

built, it would not be actionable; but that the obstruction in question was not "temporary," in that sense.

The first prayer granted by the court, at page 14 of the record, limited recovery to *the three years preceding the bringing of the action.* Again, at page 20, the right to recover was limited to damages from "the manner in which that workshop has been used *for those three years*, if you find it to have been a nuisance." And, at page 22, the last words of the charge are, "You are only to consider the actual damages which those who worship in that church suffered from this nuisance, if you find it to have been a nuisance, *during that period.*"

(3.) In the last place, upon this question as to the measure of damages, it is claimed that interest on the difference between the value of the property with, and its value without, the damaging cause, is all that can be recovered.

That is to say, if the church building could be sold for as much for a warehouse, or a bar-room, or for some other purpose, as it would have brought in the market before the company's works were erected, the plaintiff below was entitled to no damages at all.

Except in the single case of vacant, unimproved ground, the measure of damages suggested is not sustained by any of the authorities cited.

Ford vs. R. R. Co., 14 Wisc., 663, does not touch the question as to measure of damages.

In Blaesch vs. R. R. Co., 43 Wisc., 195, the measure of damages was said to be the difference between the annual value with, and the annual value without, the defendant's road in front of the property; in other words, in estimating damages, it credits the defendant with such enhancement of value to the plaintiff's property as resulted from the location of the defendant's road. *Interest* is not referred to.

Carl vs. Sheboygan R. R., 46 Wisc., contains no reference to interest, but lays down the measure of damages as follows: "She (the plaintiff) is entitled to recover as damages the difference between *the value of the use of the lot* without the railroad, and its value with the railroad in the street in front thereof, *and any other special and temporary damage she may have sustained in the use of the lot, occasioned by such railroad.*"

In the case at bar, it is not claimed in the record that "the value of the use of" the property was in any way enhanced by the company's works.

So, also, Ottawa Gas Co., vs. Graham, 28 Ill., cited by the other

side, does not mention interest. On the contrary, it declares, "All the circumstances may be proved and considered."

In Francis vs. Schoellkopf, 53 N. Y., 152, the true measure of damages was held to be the difference between the rental value unaffected by the nuisance and the rental value subject to it. But in that case the plaintiff did not occupy, but rented her premises; and the court, *on that ground expressly*, excluded the injury done to the tenants.

The measure of damages contended for by the defendant is not sustained by any authority, and is moreover manifestly unjust and unreasonable.

The second, sixth, and ninth of defendant's exceptions, we submit, therefore, are not well taken.

III.

The third question presented by the defendant's exceptions to the rulings of the court below relates to the "special damage" which will support a private action for injuries arising from a public nuisance.

The second count of the declaration states that the defendant constructed a track across a street, not included in its prescribed right of way, within a short distance, to wit, fifty feet, from the church property, which is situated on the street in question, and, by means of the passage and repassage of its locomotives over said track, at all hours of the day and night, hindered, delayed and obstructed access to the church, and rendered approach thereto difficult and dangerous; that said locomotives were allowed to stop upon and across the pavement or side-walk of said street, along which the members of the plaintiff society or congregation were compelled to pass in order to reach the church building, while the tenders and cars attached were being loaded and unloaded with coals and other substances, &c., &c., to the great inconvenience, hindrance, discomfort, interruption, and annoyance of the said society or congregation, and to the great depreciation in value of its said property, rendering the church unsuitable and unfit for the purpose for which it was erected and used, and to the great damage of the plaintiff, &c.

Evidence on behalf of the plaintiff, tending to prove all of these averments, was offered at the trial, (pp. 8 and 9 of the printed record,) and was not controverted on the other side.

(1.) Some argument was offered on behalf of the plaintiff in error before the General Term, and will be repeated here, to show that the

track in question is laid entirely upon Virginia Avenue, and does not cross D street.

Even if such a question could be considered by this court, there is nothing in the record to support the proposition. On the contrary, the evidence offered on behalf of the *plaintiff in error* shows that its works, to which said track leads, are situated "at the junction of Virginia Avenue and Sixth street, and between Virginia Avenue, *D* and C streets, southwest," (Record, p. 10); and that between the track and the church are three buildings, which front on D street (p. 12). Exhibit W. F., to the bill of exceptions, shows that a triangular reservation intervenes between, and separates Virginia Avenue from D street; and that the north curb line of Virginia Avenue intersects the track in question at a point twenty feet or more south of the south curb line of D street, as per scale. From the point of such intersection, the track extends, as per the scale, a distance of seventy-five feet, to the building line of the company's premises, on the north side of D street, and thence into said premises.

The Act of Congress, approved Feb. 5th, 1867, (14 Stat., 387), allowing the company to enter the District, provides as follows: "But the said company, in passing into the District aforesaid, and constructing the said road within the same, *shall enter the city of Washington at such place, and shall pass along such public street or alley, to such point or terminus within the said city as may be allowed by Congress upon presentation of survey and map of proposed location of said road.*"

The Act of March 18th, 1869, (16 Stat., 1), passed after the survey, allowed the company its choice of two routes within the city, the one chosen being the following: "Beginning at some point on the northern shore of the eastern branch of the Potomac river between south L and south M streets; thence westwardly between said streets to the intersection of Virginia Avenue with south L and east Twelfth streets; thence along said Virginia Avenue nortwestwardly to south K street; thence along said south K street westwardly to south Fourth street; thence by a line curving to the right, to the north bank of the canal; and thence along the said bank of the canal northwestwardly to Virginia Avenue; *thense along Virginia Avenue northwestwardly to the intersection of south C and west Ninth streets.*"

From the intersection of the bank of the canal with Virginia Avenue, which is at First street southwest, to the intersection of that Avenue with south C and west Ninth streets, therefore, the company was expressly prohibited from constructing its road anywhere, except

"along Virginia Avenue northwestwardly." A subsequent act allowed it to pass up Sixth street; but that act has no bearing upon this case.

A railroad company authorized to construct its road *across* public streets, is not thereby authorized to lay its tracks *along* any public street. (R. R. Co., vs. Newark, 10 N. J., Eq., 352.)

The plaintiff in error here, therefore, could not *cross* Virginia Avenue. Still less could it leave that Avenue, and construct a track across, or upon, another street.

"The public have rights in the public highways of the State, which can be impaired or interfered with by nothing short of authority conferred by the sovereign power of the State itself. That authority must be *expressly* given; or if conferred by *implication*, it must be a *necessary* implication, such as will necessarily and naturally flow out of the law from whence it is derived, not a necessary implication to be whittled down into a reasonable intendment, and then to become a mere matter of expediency, and then to be resolved into a mere question of dollars and cents." (R. R. Co., vs. Newark, *supra.*)

"A company has the right to appropriate a street only where the authority has been given by the sovereign power of the State. When a railroad authorized to be made at one place is made at another, it is a mere nuisance on every highway it touches in its illegal course." (Commonwealth vs. R. R. Co., 27 Pa. St,, 339.)

(2.) It is contended on the other side that the charter of the company invests it with power to acquire lands suitable for such "works" as it needs, under which power it acquired the present site of its engine-house and repair-shops in the city of Washington; and that it would be unreasonable to suppose that the legislature gave the power to acquire the site, but denied access to it.

The Act of Feb. 5th, 1867, cited above, authorizes the construction of the road, within the city, upon such public streets or alleys *only* as Congress should allow, "upon presentation of survey and map of proposed location of said road." The route subsequently allowed by Congress is only *along* the streets designated, to the prescribed terminus; without any license to *cross* those streets (still less to occupy others) with tracks leading, not to the designated terminus, but to private workshops of the company. The legitimate implication, therefore, is, not in favor of the right to obstruct other streets, at the discretion of the company, with tracks leading to its workshops, but against the right to locate the workshops within the city at all.

(3.) In the third and last place, upon this third question, it is contended that the track across D street is, at most, a public nuisance, and that the plaintiff below has not averred in its declaration such special damage as entitles it to maintain a private action for the injuries to it resulting therefrom.

It is not claimed that the averments of the declaration are not fully sustained by the evidence offered in support thereof. The question is, therefore, as to the legal sufficiency of the averments of the second count of the declaration, as to special damage.

These averments are that the defendant, by means of the obstruction in question—

(1.) Obstructed access to the church, rendering the same both difficult and dangerous.

(2.) Greatly depreciated the value of the property.

(3.) Rendering the church building unsuitable and unfit for the purpose for which it was erected, and used.

It is difficult to see how these injuries can be said to be suffered by the public at large in common with the plaintiff. A railroad track extending, not along, but *across*, a street, not at its intersection with another street, but midway of a particular square, surely does not affect the property of the public at large, or of any considerable portion of the public, in the same manner as it affects a building fronting the particular street, in the particular square, and distant only a few yards from the track in question; especially where the declaration avers, and the uncontradicted testimony shows, that the society or congregation owning said property are compelled to cross that track in order to reach it.

The authorities are divided as to the true test for determining whether injuries accruing to individuals from public nuisances do, or do not, amount to "special damages," for which private actions may be brought. According to some courts, the damage must be special, with reference to the *number of persons* affected thereby; according to the others, it must be special, with reference to the *nature of the injury* which is inflicted.

The first of these tests is that contended for by the plaintiff in error. Its basis is, the theory that the prevention of numerous suits is the reason of the rule requiring special damage in order to maintain a private action. If a public nuisance cuts off access from one house, or renders it uninhabitable, the owner shall have damages; but if a hundred houses are similarly injured, then, rather than impose upon

the courts the trial of a hundred cases, none of the owners may demand compensation.

While general expressions to the above purport may be found here and there, the cases decided upon this principle are comparatively few. Generally, the injuries complained of were not, *in their nature*, special to the party complaining.

Thus, Proprietors of Quincy Canal Co., vs. Newcomb, 7 Met., 283, cited on the other side, was a suit by the canal company for tolls, resisted by the defendant on the ground that the canal was not built to the depth required by the plaintiff's charter. No special injury to either the person or the property of the defendant, nor any damage distinguishable from that of the public at large, was averred; *held*, no defence.

Fall River Iron Co., vs. Old Colony R. R. Co., 5 Allen, 221, was a bill to enjoin the obstruction of a stream "navigable and in great use by the plaintiffs and others for the passage of vessels." No special damage.

Smith vs. Boston, 7 Cush., 254, was for closing up part of a street, thus rendering plaintiff's lots less accessible from some directions. Judgment against the plaintiff, expressly upon the ground that his lots did not abut upon the highway discontinued. And the court added that even this fact would not be conclusive against the right to recover in all cases.

In Houck vs. Waucher, 34 Md., 265, the special damage alleged was, that, having gone to town by the highway in question, the plaintiff met the obstruction as he was returning, and was obliged to proceed to his farm by a very circuitous route; *Held*, only a particular instance of an inconvenience common to the rest of the community, and not, in the opinion of the court, special damage. The express ground of the decision is, absence of averment that the highway in question was necessary to enable the plaintiff to pass to and from his farm. That averment, in this case, is contained in the declaration, and supported by the testimony.

Brown vs. Watson, 47 Me., 161, is identical in its facts with Houck vs. Waucher; *Held*, after careful and elaborate review of the authorities, special damage, and plaintiff recovered. See, also, Dudley vs. Kennedy, 63 Me., 465; and Pierce vs. Dart, 7 Cow. 608, cited on the other side.

The last named case grew out of building a fence across a street, near plaintiff's residence. There was no allegation or proof that the

house abutted upon the highway, or that the property was damaged, or its use and enjoyment interfered with. *Held*, that mere contiguity to the house was not special damage; but that plaintiff's delay and labor in pulling down the fence, was.

But three of the cases cited on the other side deny the redress sought by the plaintiffs on the ground that numerous other persons suffered like injuries. These are Brainard vs. Conn. River Co., 7 Cush., 510; Osborn vs. R. R. Co., 5 Blatchf., 366, and Currier vs. R. R. Co., 6 Blatchf., 487.

The first of these was a bill by two private persons to compel the company to bridge a village street, as required by an order of the county commissioners, on which highway the plaintiffs and others had abutting lots. *Held*, that the village officers, and not private persons, should bring the action.

Osborn vs. R. R. Co., and Currier vs. R. R. Co., were bills to enjoin the construction of railroads along public streets, on which plaintiff's had abutting lots. *Held*, that plaintiffs' damage would not differ, either in kind or degree, from that of every other lot-owner upon the streets in question, and, therefore, no special damage.

With reference to these two cases, it is to be observed that the latter was decided, expressly, upon the authority of the former, and that the former was decided upon the authority of Lansing vs. Smith, 8 Cow., 146, and Davis vs. The Mayor, 14 N. Y., 506. The doctrine of Lansing vs. Smith, upon this point, was denied by all the judges when that case came a second time before the court (4 Wend. pp. 25, 31–33); and in Davis vs. The Mayor, plaintiff had no lots on the street proposed to be used for the railroad, and the opinion proceeded on that ground. In Story vs. Elevated R. R. Co., Oct. 17, 1882, the New York Court of Appeals decided that the owner of a single house *could* maintain a bill to enjoin the construction of the railroad along the street upon which his property abutted, until compensated.

Within the rule as laid down in the three cases above referred to, the damage laid in the declaration would undoubtedly be special. In each of those cases, all lot-owners upon the streets in question were injured in precisely the same manner; i. e., by having the railroad built along the highway, in front of their respective properties. In the case at bar, the track extends, not along, but across, the street, sidewalk included; cutting off access from, and depreciating the value and impairing the use and enjoyment of, only the immediately contiguous property. The railroad track here complained of does not render it

dangerous to approach any house east of Four and a Half street, or west of Sixth street.

The record shows that there are no houses on this square between this track and Sixth street. The only property, therefore, which could be affected at all similarly to that of the defendant in error, is such as abuts on D street, between the track and the corner of Four and a Half street. The entire frontage of the square on D street, between Four and a Half street and the church, as shown by Exhibit W. F. to the bill of exceptions, is only 160 feet, 6 inches. Clearly, therefore, the damage complained of by the defendant in error is quite distinct from that suffered by any considerable number of persons.

But the greatly preponderating weight of authority opposes the rule denying the right to redress where the persons injured are numerous, and establishes the *nature of the injury experienced* as the true test of special damage. If only an inconvenience alike in kind with that experienced by the public generally, compensation for each individual's share of the common inconvenience is included in the reparation to the public which the wrong-doer is required to make; but for injury to the *person* or *estate* of any individual, he is individually entitled to be compensated, and is not to be deprived of that just right merely because the wrong-doer has similarly injured the persons or estates of others.

"The people at large are supposed to be injured, merely because they can not pursue a particular track; which is an inconvenience felt by thousands, to be redressed by a prosecution in the name of the Commonwealth. They suffer no actual particular injury to their trade or estates, and a prosecution on behalf of the public furnishes the appropriate remedy. But individuals who, either in their persons or estates, suffer great damage, which may be proved to proceed and follow necessarily from the public nuisance, surely stand upon different ground. And each may have his action and recover for the particular damage, according to the evidence." (Stetson vs. Faxon, 19 Pick., 160.)

"We agree that the plaintiff must set forth a special damage. It will not be sufficient for him to state merely that the defendant obstructed the highway in such a manner as that he could not pass through it. (Fineux vs. Hovenden, Cro. Eliz., 664.) He must fail unless he goes on and states that he has sustained a particular injury, different in its character from that which is common to all the citizens." *He'd*, that averments to the effect that, by means of the obstruction,

plaintiff's warehouses were obscured and injured, and access thereto prevented, along the part of the highway so obstructed, and that the free communication formerly enjoyed by plaintiff and other persons who resorted to his warehouses was diminished and hindered, &c., showed special damage. *Ib.* "Let compensation go hand in hand with the public benefit." *Ib.*, p. 162.

Corning vs. Lowerre, 6 John. Ch. R., 439, was a bill to restrain the defendant from building a house so as to obstruct a public street, to the injury of plaintiffs as owners of lots on and adjoining that street. Granted, by Chancellor Kent, "inasmuch as here was *a special grievance to the plaintiffs, affecting the enjoyment of their property, and the value of it.* The obstruction was not only a common or public nuisance, but worked a *special* injury to the plaintiffs."

This case is cited, and the principle as laid down in it approved, by this court, in City of Georgetown vs. Alexandria Canal Co., 12 Pet., at p. 99.

Obstruction in a public harbor, depriving vessels of access to plaintiff's wharf, is special damage for which private action will lie. (Frink vs. Lawrence, 20 Conn., 118.)

Obstruction to navigable river, hindering access to a messuage abutting upon it, is special damage. (Dobson vs. Blackmore. 58 E. C. L., 991.)

A street obstruction, although a public nuisance, inflicts special damage if it darkens plaintiff's windows, *or* injects bad smells, *or* obstructs access to his premises and thereby diminishes his trade. (Benjamin vs. Storr, L. R., 9 C. P., 407.)

"So far as it causes private, individual injury, the law will afford a remedy therefor. * * * Among the various injuries resulting from nuisances for which the law permits actions for damages in favor of the individuals affected thereby, those resulting from the obstruction of highways leading to the premises of the plaintiff, and interfering with access thereto, and causing other special damages, are held to be grounds of recovery in an action by the party injured. In such cases, actions may be maintained, though many persons other than the plaintiff sustain, from the same nuisances, like injuries." (Park vs. R. R. Co., 43 Iowa, 636.)

In the case last cited, the court told the jury that they "should inquire into and determine the effect the obstruction of the highway had upon the use and enjoyment of the plaintiff's property during the continuance of the nuisance, together with the character and ex-

tent of his business, and its depreciation by the obstructions, from which they should find the damages he sustained." Held correct.

"Undoubtedly if the obstructions only affect the plaintiff in common with the public at large, although in a greater degree, he cannot have his private action; but if he is thereby obstructed in the free use of his property, and its comfortable enjoyment by him is thereby interfered with, and to some extent prevented, can it be said he suffers only in common with the public at large?" (Blanc vs. Klumpke, 29 Cal., 156.)

"This is not an action for obstructing the river, but for obstructing access to the plaintiff's house." (Rose vs. Groves, 5 M. & Gr., 616.)

Wilkes vs. Hungerford Market Co., 2 Bing. N. C., 281, is a leading case, in which, as the court say in Stetson vs. Faxon, *supra*, the cases, from the Year Books down, were examined. The plaintiff, a bookseller, alleged that the defendants by obstructing the highway diverted travel to the other side, whereby his business was injured. Defendants objected that this was a public nuisance. *Held*, that the private action could be maintained. "All who passed, had the right of way; but all had not shops."

"The idea that if by a wrongful act a serious injury is inflicted upon a single individual a recovery may be had therefor against the wrongdoer, and that if by the same act numbers are so injured no recovery can be had by any one, is absurd. It is said that holding the defendants liable to respond in an action to each one injured will lead to a multiplicity of actions. This is true, but it is no defense to a wrongdoer, when called upon to compensate for the damages sustained from his wrongful act to show that he, by the same act, inflicted a like injury upon numerous other persons. The position is unsustained by any authority. While in the application to particular cases there is some conflict, yet there is none whatever in the rule itself. That rule is that one erecting or maintaining a common nuisance is not liable to an action at the suit of one who has sustained no damage therefrom, except such as is common to the entire community: yet he is liable at the suit of one who has sustained damages peculiar to himself. No matter how numerous the persons may be who have sustained this peculiar damage, each is entitled to compensation for his injury. When the injury is common to the public and special to none, redress must be sought by a criminal prosecution in behalf of all. (Francis vs. Schoellkopf, 53 N. Y., 152.)

"It is urged that, to sustain this action, would lead to a multiplicity of suits; that is to say, that very many persons have been put to loss and inconvenience by reason of the wrong-doings of the defendants; and that because they are so many, therefore, none should receive compensation. In other words, the better is the defence of wrong-doers, the more numerous the persons whom they have injured, and the more extensive and wide-spread the consequences of their injurious acts. A principle like this would undoubtedly be grateful to all wrong-doers." (Brown vs. Watson, 47 Me., 161.)

To same effect as the foregoing, see Pierce vs. Dart, 7 Cow., 608; Haynes vs. Thomas, 7 Ind., 44; Schurmeier vs. R. R. Co., 10 Minn., 59; Dudley vs. Kennedy, 63 Me., 465; Clark vs. Peckham, 10 R. I., 35; In Matter of Lewis Street, 2 Wend., 472; Livingston vs. Mayor of New York, 8 Wend., 85; Tate vs. R. R. Co., 7 Ind., 479; Bingham vs. Doane, 9 Ohio, 165; Ewell vs. Greenwood, 26 Iowa, 377; Soltan vs. De Held, 2 Sim., N. S., 133.

Unless obstructing and making dangerous access to the property of the defendant in error, greatly depreciating its value, and rendering it unsuitable and unfit for the purpose for which it was erected and used, can be regarded as "injury common to the public and special to none," we submit that the remaining exceptions to the rulings of the presiding justice are not well taken.

IV.

A fourth objection is taken, *in this court*, to the granting of the third prayer of the plaintiff below, relating to the effect of the dangerous obstruction of D street upon the attendance of the children belonging to the plaintiff society or congregation upon its Sunday School exercises. The objection proceeds upon the ground that the declaration alleges the erection and use of the church building to have been "for the purposes of a place of 'public religious worship;' not for the purposes of a school-house."

The declaration avers that the plaintiff was possessed of its lot of ground, and erected its building thereon, for the purpose of being used as a meeting-house, or place of public religious worship. It surely need not be averred, at this day, that the religious instruction and edification of the children, the junior members, of the society or congregation, by exercises adapted to their ages and understandings, constitute a general and very important part of the purposes for which churches are erected and used.

The record, pp. 7–8, shows that the regular religious services or worship engaged in by this congregation every Sabbath were, Sunday-school exercises at 9 A. M., preaching at 11 A. M., and preaching again at 8 P. M. Was it more necessary to specially plead the first, than the second or the third, of these exercises or methods of worship?

The declaration specially alleges that access to its property was obstructed and made dangerous, the property depreciated in value, and the church building rendered unsuitable and unfit for the purposes for which it was erected and used. Was it necessary to specify the ages of persons whose access was obstructed, or which of the several religious services held at the church they attended?

The objection presented in the fourth assignment of error is not included, however, in the foregoing brief, as one of the questions before this court, for the reason that no valid or competent exception to the ruling it questions was taken at the trial.

The record shows (pp. 8–9) that evidence was offered by the plaintiff below showing that defendant's locomotives stood daily at the entrance of its premises, with their cow-catchers protruding beyond the enclosure, and that they sometimes stood clear across the sidewalk; that on several occasions members of the church and congregation narrowly escaped being run over by the sudden starting of these locomotives, without note or warning; and that attendance upon the Sunday-school, which was a source of revenue to the plaintiff, had been thereby largely diminished. *This evidence went in without objection.* The plaintiff requested the court (p. 16) to instruct the jury that they might consider these facts, if they should find them to be facts, in making up their verdict; *to the granting of which prayer, also, no objection was made, or special exception taken.*

The court thereupon, after having stated the considerations upon which it granted the prayer in question, "*further instructed the jury,*" *with reference to the endangering of access to the church*, by means of the locomotives, as follows: "A party is entitled to be compensated, *not only for actual damages* sustained from the acts of the defendant, but in a case like this is entitled to his damages *for a continuous and threatened danger.* A man is entitled to recover damages from the owner of an adjoining property ready to tumble down upon himself or his family. That is a threatened danger, and although the danger may not have been actually sustained, yet people are not to be kept in alarm constantly by a threat of danger." And again: "In private actions like this, it may be taken into consideration by the jury

whether those engines standing inside the house and passing out and in so frequently as they do, and in that place, produce *a reasonable and fair apprehension of danger* to persons passing to that church, especially to children passing to Sunday-school. You can take that element into your consideration."

Thereupon, one general exception was taken.

It is obvious that the instructions given by the court to the jury immediately preceding this exception, related, not to diminution of income from the Sunday-school, (the objection presented in the fourth assignment of error), but to a different matter particularly and specifically alleged in the second count of the declaration, viz.: that the defendant, during the period covered by the suit, was accustomed, by means of its locomotive engines, to "hinder, delay and obstruct, and to render difficult *and dangerous*, access to said meeting-house," to the great damage of the plaintiff, &c. The court told the jury that *a continuous and threatened danger* was a nuisance, for which the party injured is entitled to be compensated; and this instruction was undoubtedly correct. (2 Greenl. Ev., § 466, and citations; Scott vs. Bay, 3 Md., 432; Barnes vs. Hathorn, 54 Me., 127; Chantler vs. Robinson, 4 Exch., 163.)

It is clearly incompetent for a defendant, after having permitted evidence of a particular damage to go in without objection, and a prayer, embodying merely the legal effect of such evidence when admitted, to be granted without exception then taken, to have the correctness of such ruling considered in the appellate tribunal, in the first instance, by means of a general exception interposed after, and having apparent relation to, the charge of the court upon a different subject.

Even if the plaintiff in error's exceptions could have the effect for which, perhaps, they were intended, i. e., each to bring up all the instructions given by the presiding justice since the immediately preceding exception was interposed, and thus secure review by this court of the entire charge; still it is clear that they would not avail *unless all the propositions intended to be covered by any one exception* were erroneous. Where distinct propositions are embraced in the charge, "a general exception in such case can not avail the party if any one of them is correct." (Lincoln vs. Claflin, 7 Wall., 139.)

This, it is believed, is the uniform rule of practice in all courts, and has been repeatedly reiterated by this court; (see citations at page 5 of this brief.) And that the proposition immediately preceding the

plaintiff in error's third exception is sound in law, is unquestionable. The propositions contained in the instructions given by the court in lieu of the plaintiff's fifth prayer are, also, it is believed, indisputably correct. Indeed, the one immediately preceding the exception (record, p. 19) is the principle mainly relied upon as a defence to the action, viz.: that the plaintiff was not entitled to recover for the obstruction of D street, unless it showed special damages, differing from the kind of damages sustained by the public.

Upon the foregoing considerations and authorities, it is submitted, therefore,

I. That the plaintiff in error is not, by the acts authorizing it to construct such works as are necessary and expedient for the completion and maintenance of its railroad, thereby exonerated from liability for the erection and maintenance of its workshops, upon its own private property, in a locality where they are destructive of the use and enjoyment of adjoining property, and where, if erected by a natural person, they would be a private nuisance.

II. That the fact that an incorporated religious society or congregation is the owner of the property in question, does not vary the rule of law that the discomfort and inconvenience of the owner in the use and enjoyment of his property is an element which may be considered in estimating the damages to be awarded for a nuisance.

III. That the obstruction of a public street, by constructing and operating a railroad across it, without authority of law, thereby depreciating the value of the immediately contiguous property, rendering it difficult and dangerous of access, and unsuitable and unfit for its ordinary and reasonable uses, is special damage for which the owner is entitled to be compensated.

IV. That the instructions given by the court below with reference to the Sunday-school are neither erroneous, nor competently before this court for review.

V. That the judgment below should be affirmed.

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